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Supreme Court, U.S.
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No.

In The Supreme Court

OF THE

United States

OCTOBER TERM, 1991

PETE WILSON, in his official capacity as Governor of the State of California; BENJAMIN T. HACKER, as Director of the State Department of Veterans Affairs; STATE DEPARTMENT OF VETERANS AFFAIRS; and THE STATE OF CALIFORNIA,
Petitioners,

v.

CHARLES DEL MONTE, NICHOLAS DEL MONTE, ANDREW DEL MONTE, and MICHAEL GURECKAS, Individually and on Behalf of the Class They Represent; JOAN DEL MONTE, KARL SEUTHE, CLYDE MCCOWN, and JOHN RIGNEY, Individually and as Tax Payers,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. DOES CALIFORNIA'S STATUTORY REQUIREMENT OF STATE RESIDENCE AT TIME OF ENTRY INTO MILITARY SERVICE AS A CONDITION OF ELIGIBILITY FOR CERTAIN VETERANS' BENEFITS[1] VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT?

a. In declaring the requirement violative of the Equal Protection Clause, did the California Supreme Court err in concluding that it was constrained by recent decisions of the United States Supreme Court[2] to hold the requirement unconstitutional?

(1). Are *Zobel, Williams,* and *Hooper* dispositive of this case, and if not, does *Soto-Lopez* compel the result reached by the California Supreme Court?

(2). If *Zobel, Williams,* and *Hooper* are not dispositive, and if *Soto-Lopez* does compel that result, should *Soto-Lopez* be overruled as being wrong on principle or wrongly decided?

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[1] *California Military and Veterans Code* § 980(a)(1)&(2) [Cal-Vet loan benefit]; and *1987-88 California Budget Act,* Item 1960 [veterans' dependents' educational benefits].

[2] *Zobel v. Williams* (1982) 457 U.S. 55, 102 S.Ct. 2309; *Williams v. Vermont* (1985) 472 U.S. 14, 105 S.Ct. 2465; *Hooper v. Bernalillo County Assessor* (1985) 472 U.S. 612, 105 S.Ct. 2862; *Attorney General of New York v. Soto-Lopez* (1986) 476 U.S. 898, 106 S.Ct. 2317.

PARTIES TO THE PROCEEDING

The names of all parties to the proceeding appear in the caption of the case.

As to the Petitioners (Defendants and Respondents below), the California Supreme Court substituted Governor Pete Wilson for former Governor George Deukmejian, and we have substituted Director Benjamin T. Hacker for former Director Jesse G. Ugalde.

The Respondents herein (Plaintiffs and Appellants below) are the same parties as in the proceedings below.

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OPINIONS BELOW

The opinion of the California Supreme Court was issued on February 24, 1992, and is reported as *Del Monte v. Wilson* (1992) 1 Cal.4th 1009, 4 Cal.Rptr.2d 826, 824 P.2d 632. [Also, see Appendix (A-1-20)].

The opinion of the California Court of Appeal, Second Appellate District (Court of Appeal), was issued on May 23, 1991, and was reported as *Del Monte v. Deukmejian* (1991) 1 Cal.App.4th

1213, 230 Cal.App.3d 462, 281 Cal.Rptr. 380. [See Appendix (A-21-40)].[3]

The judgment of the Superior Court of California, County of Los Angeles, the court of first instance, was entered on March 6, 1989. Its opinion was filed on January 26, 1989. Copies of both of these documents are contained in the Appendix. [See Appendix (A-41,42 & A-43-55)].

JURISDICTION

The final decision of the California Supreme Court was entered on February 24, 1992. There were no orders respecting a rehearing or granting an extension of time within which to file a petition for a writ of certiorari. Jurisdiction is conferred on this Court by 28 U.S.C. § 1257(a), which provides in part as follows:

> "(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States . . . ."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment's Equal Protection Clause provides in part that:

> ". . . No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amend. XIV, § 1.

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[3] Review was granted by the California Supreme Court and this opinion was superseded by *Del Monte v. Deukmejian* (1991) 285 Cal.Rptr 230, 815 P.2d 303.

The California statute at issue provides in part that:

> "(a) As used in this chapter, 'veteran' means any of the following:
>
> * * *
>
> "(2) Any person who served in the active military, naval, or air service of the United States . . .; [and who] was at the time of entry into active duty a native of or bona fide resident of this state . . . ." Cal. Mil. & Vet. Code § 980(a)(2).

STATEMENT OF THE CASE

Summary of Material Facts

The statute at issue requires, as a condition of eligibility for a veterans' farm or home purchase loan (Cal-Vet loan),[4] that a veteran must be a native of California or must have been a bona fide resident of California at the time of entry into active military service (active duty). Cal. Mil. & Vet. Code § 980(a)(1)&(2). The term "entry into active duty" has long been construed by the State as including not only the original entry but also any subsequent re-enlistment or re-entry. 56 Ops.Cal.Atty.Gen. 294.

The Cal-Vet loan program is 71 years old. The statute at issue was first enacted as part of the Veterans' Welfare Act of 1921, was reenacted as part of the Veterans' Farm and Home Purchase Act of 1943, and enacted again as part of the Veterans' Farm and Home Purchase Act of 1974. Since 1943, the people of the State of California, in 20 separate ballot measures, have authorized the sale of over $7.4 billion of veterans' general obligation bonds to provide funds for the program. Veterans' Bond Acts of 1943-1990, Mil. & Vet. Code §§ 990-998.112. Since 1970, the State Legislature has authorized the sale of over $1.5 billion of veterans' revenue bonds to supplement the general obligation bond funding. Mil. & Vet. Code 1000.1-1001.9.

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[4] The Cal-Vet loan program provides for direct farm and home loans to eligible veterans, with a $200,000 maximum for a farm and a $125,000 maximum for a home. Cal. Mil. & Vet. Code § 987.65.

However, since the enactment of the federal Mortgage Subsidy Bond Tax Act of 1980, Congress has enacted ever-increasing restrictions on the uses of tax-exempt housing bonds, including state ceilings or volume caps. 26 U.S.C.A. § 143(1)(3) & 146(d).[5] These restrictions have limited the State's ability to fund its housing programs adequately, including the CalVet loan program. The decision of the California Supreme Court extends the benefits to the excluded class (Appendix A-19), and would increase the number of eligible veterans to such an extent that the State would be unable to meet even a small part of the demand.[6]

The Budget Act provision at issue annually appropriates funds to the California Department of Veterans Affairs for the veterans' dependents' educational assistance program.[7] Cal. Mil. & Vet. Code §§ 890-899. Since the 1978-79 fiscal year, control language in the appropriation has prohibited the Department from spending the appropriated funds for educational assistance to dependents of non-California veterans.

A "non-California veteran" is defined as a "person not meeting the requirements of Section 980" of the Code. 1987-88 Cal. Budget Act, Item 1960. For this reason, the challenge to the Budget Act provision is based upon and follows as a normal result of the challenge to Section 980 of the Code, and is an integral part thereof.

Respondent Charles Del Monte is a disabled non-California veteran. His sons, Respondents Nicholas and Andrew Del Monte,

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[5] For example, California's annual ceiling for its general obligation veterans' bonds is $340 million.

[6] Although the exact number is not known, Respondents estimated below that the number of "non-California" veterans now residing in California was, at a minimum, 6[illegible]5,500. With the present Cal-Vet loan maximum of $125,000, only 2,720 loans in that amount can be made from the annual ceiling of $340 million.

[7] The veterans' dependents' educational assistance program provides for payments of small monthly high school and college stipends ($50 and $100) to dependents of deceased or disabled veterans. Cal. Mil. & Vet. Code § 894.

applied for dependents' educational assistance for a period of several years (1983-1987). Except for a brief period in 1986 and 1987 when the benefits were granted and paid in error, their applications were denied on the ground that their father was a non-California veteran.

Respondent Michael Gureckas is a non-California veteran who sought information about a Cal-Vet loan in 1971, and was told that he did not qualify because he was not a California resident when he entered or re-entered the service. Respondent Joan Del Monte is the spouse of Respondent Charles Del Monte, and bases her challenge on her status as a taxpayer. Respondents Karl Seuthe, Clyde McCown, and John Rigney are non-California veterans who came to reside in California some time after their active military service, but never applied for any California veterans' benefits. Their challenge is also based on their status as taxpayers.

Procedural History

The underlying action by Respondents was a petition for writ of mandate and complaint for declaratory and injunctive relief, challenging on equal protection grounds (and other grounds not pertinent here) the constitutionality of these statutory and budgetary provisions.

Respondents filed their original petition and complaint on May 6, 1988, in the Superior Court of California, County of Los Angeles (Trial Court).

A first amended petition was filed on May 17, 1988, as a matter of course or right. After certain law and motion proceedings[8] which are not pertinent here, a second amended petition, superseding the earlier pleadings, was filed on August 1, 1988, with leave of court.

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[8] The action was filed as a class action, and among the motions made was a motion to certify certain classes and sub-classes, but in view of the trial court's disposition, no ruling was made on the motion and a class was not certified.

The State (Petitioners herein) filed its answer to the second amended petition on August 11, 1988.

The federal question sought to be reviewed here was raised by Respondents in the Trial Court in their second amended petition, on the first page of which they alleged as follows:

> "1. Under California law, veterans residing in the state may qualify for a number of state benefits for themselves and their family members. At issue in this lawsuit are those benefits for which the legislature has conditioned eligibility on the veteran's having been a California resident at the time of entry in the service. ('Cal-Vets')... . The respondents consistently apply these eligibility restrictions, despite the fact that the United States Supreme Court has ruled that such residency requirements are unconstitutional. *Hooper v. Bernalillo County Assessor,* 472 U.S. 612, 86 L.Ed.2d 437, 105 S.Ct. 2862 (1985); *Zobel v. Williams,* 457 U.S. 55, 72 L.Ed. 672, 102 S.Ct. 2309 (1982); *Attorney General of New York v. Soto-Lopez,* 106 S.Ct. 2317 (1986)...."

The action sought a peremptory writ of mandate ordering the State to grant veterans' benefits and veterans' property tax exemptions[9] without regard to the residency requirements; and a declaratory judgment that Item 1960 of the Annual Budget Act was unconstitutional under the federal Constitution and that it violated the single-subject rule of the California Constitution.

The action also sought a declaratory judgment that the State's alleged practice of summarily denying and terminating veterans' benefits violated the due process clauses of the federal Constitution and the California Constitution; and injunctions enjoining the State from applying or enforcing the residency requirements.

Trial was had and on March 6, 1989, the Trial Court rendered its judgment denying the petition for peremptory writ of mandate;

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[9] The residency requirement for the veterans' property tax exemption was contained in the California Constitution. Respondents later withdrew their challenge to this residency requirement because of the passage in California of Proposition 93, which eliminated the requirement.

declaring that Section 980 of the Military and Veterans Code and Item 1960 of the Budget Act were not unconstitutional; that Item 1960 did not violate the single-subject rule;[10] that the State did not have a current policy and practice of summarily denying and terminating benefits, and that the State's current appeal procedures did not violate the due process clause;[11] (Appendix A-41,42).

The Trial Court had announced and explained its decision in open court on December 7, 1988, and that opinion, entitled "Statement of Intended Decision," was filed on January 26, 1989. (Appendix A-43-55).

On the federal question sought to be reviewed here, the Trial Court held as follows:

> "This Court holds, for the reasons given, that the California Home Purchase and Educational Benefit provisions of the California Veterans Law do not violate the equal protection or privileges and immunities clauses of the Federal Constitution or interfere with, deter, or penalize plaintiff's right to travel; and, accordingly, denies plaintiff's petition and the remedies sought therein." (Appendix A-52).

Appeal from the judgment of the Trial Court was taken by Respondents to the California Court of Appeal, Second Appellate District (Court of Appeal).

The federal question sought to be reviewed here was raised by Respondents in the Court of Appeal at the beginning of their opening brief, wherein on the first page thereof they asserted the question as follows:

> "Appellants appeal from the Superior Court's denial of their Petition/Complaint which challenged: (1) the constitutionality of sections 980 (a) . . . and Item 1960 of the Annual Budget Act, which condition eligibility for statutory

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[10] This was a State constitutional issue which is not an issue here.

[11] The State did not seek review by the California Supreme Court of the later decision of the Court of Appeal reversing the Trial Court on these issues, and they are not at issue here.

veterans' benefits upon the veterans' residency in California at the time of entry into active duty. . . .

"The United States Supreme Court has unequivocally ruled that the type of residency requirement which is at issue in this lawsuit violates veterans' rights to equal protection. . . ."

On May 23, 1991,[12] the Court of Appeal filed its decision reversing the judgment and remanding the cause to the Trial Court "with instructions to issue the peremptory writ of mandate and for proceedings consistent with this opinion." *Del Monte vs. Deukmejian* (1991) 230 Cal.App.3d 462, 478-479, 281 Cal. Rptr. 380.

In its opinion, the Court of Appeal held as follows:

"Bound by the doctrine of stare decisis and U.S. Supreme Court interpretations of the constitutionality of similar benefit programs in *Zobel, Soto-Lopez* and *Hooper,* we find California's plan of preferring established California resident veterans over otherwise bona fide resident veterans of California violative of the equal protection clause of the federal Constitution." 230 Cal.App.3d 462, 464. (Appendix A-22).

On July 2, 1991, the State filed its petition for review of the Court of Appeal decision with the California Supreme Court. On August 22, 1991, the California Supreme Court issued its order granting review. *Del Monte v. Deukmejian* (1991) 285 Cal.Rptr. 230, 815 P.2d 303.

The federal question sought to be reviewed here was raised by the State before the California Supreme Court in its petition for review and in its brief on the merits, wherein the question was stated as follows:

"1. DOES CALIFORNIA'S STATUTORY REQUIREMENT OF STATE RESIDENCE AT TIME OF ENTRY INTO ACTIVE MILITARY SERVICE AS A

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[12] The long delay between the Trial Court's judgment and the decision of the Court of Appeal was caused in large part by difficulties in procuring the trial record due to inability to locate the court reporter.

CONDITION OF ELIGIBILITY FOR A CAL-VET LOAN VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION?

On February 24, 1992, the California Supreme Court filed its decision affirming the Court of Appeal decision and remanding the cause to the Court of Appeal "with directions to remand the cause to the superior court for further proceedings not inconsistent with this opinion." *Del Monte v. Wilson* (1992) 1 Cal.4th 1009, 4 Cal.Rptr.2d 826, 837, 824 P.2d 632, 643. (Appendix A-19).

In its opinion, the California Supreme Court held as follows:

> "We are to decide whether the distribution of veterans benefits conditioned on California residency at a fixed point in the past violates the federal constitutional right to equal protection of the laws. We conclude that we are constrained by recent decisions of the United States Supreme Court to hold the statutes providing for such a distribution are unconstitutional." 4 Cal.Rptr.2d 426, 426. (Appendix A-1).

On this procedural record showing the manner or method in which the federal question sought to be reviewed was raised and how it was passed upon, Petitioners believe that the question was timely and properly raised and decided at every stage in the proceedings below, and that this Court has jurisdiction to review it on a writ of certiorari.

REASONS FOR ALLOWANCE OF THE WRIT

As shown above, the California Supreme Court has held that California's veterans' benefit residency statute is unconstitutional on the ground that it is repugnant to the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and this Court has jurisdiction under 28 U.S.C. § 1257(a).

This Court's rules provide in part that one of the kinds of reasons to be considered in exercising its discretion for review on writ of certiorari is " when a state court . . . has decided an important question of federal law which has not been, but should be settled, by this Court." U.S. Sup. Ct. Rule 10.1.(c).

As will be shown below, Petitioners believe that the constitutionality of this longstanding California statute is an important question of federal law which should be, but has not been, settled definitively by this Court.

However, Petitioners are also mindful that the standards set forth in Rule 10 for granting review on writ of certiorari, while intended as specific examples of the "special and important" reasons for which review will be granted, are expressly declared to be "neither controlling nor fully measuring" of the Court's discretion to grant review.

We believe that there is another important reason for exercising that discretion to grant review in this case.

The question presented for review involves a matter of great public importance which calls for the exercise of this Court's supervisory powers over the development of federal constitutional law.

Over the last 20 years or so, beginning with *Shapiro* in 1969 and continuing up to and including *Soto-Lopez*[13] in 1986, we have witnessed a gradual judicial erosion of ever narrowly drawn residency requirements established by the states as conditions of eligibility for a variety of ever less "significant" state benefits.

The causes of this erosion have ranged from periodic but heavy downpours of "right-to-travel," "heightened scrutiny," and "compelling state interest" analyses, to slow but steady drizzles of "legitimate state interest" and "rational basis" tests.

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[13] *Shapiro v. Thompson* (1969) 394 U.S. 618, 89 S.Ct. 1322 [welfare]; *Memorial Hosp. v. Maricopa County* (1974) 415 U.S. 250, 94 S.Ct. 1076 [nonemergency medical care]; *Zobel v. Williams* (1982) 457 U.S. 55, 102 S.Ct. 2309 [distribution of windfall oil revenues]; *Williams v. Vermont* (1985) 472 U.S. 14, 105 S.Ct. 2465 [exemption from use tax on cars purchased out of state]; *Hooper v. Bernalillo County Assessor* (1985) 472 U.S. 612, 105 S.Ct. 2862 [veterans property tax exemption]; *Attorney General of New York v. Soto-Lopez* (1986) 476 U.S. 98, 106 S.Ct. 2317 [veterans' preference on civil service examinations].

Inexorably, this trend has impaired the states' abilities to establish, administer, and maintain their social and economic programs, and to exercise the discretion necessary to determine how to allocate their scarce resources.

Strong dissents have been registered in many of the cases establishing this trend, as well as separate opinions concurring on other grounds, and the decisions have been criticized severely in some cases.

These cases began by striking down durational residency requirements for "fundamental benefits," moved from there to striking down so-called "fixed-point" residency requirements for less "significant" benefits, and then moved even further to striking down a residency requirement which was neither durational nor fixed at one particular point in time, for an even less "significant" benefit.

All these factors have resulted in uncertainties as to what the holdings really stand for in these cases, as well as in how to go about an equal protection analysis.

Petitioners believe that the time has come to consider building a retaining wall to halt the erosion, to clarify the uncertainties, to reexamine the trend carefully and to determine whether the development of federal constitutional law in this important equal protection area is heading in the right direction, and to determine whether there has been an undesirable or unnecessary departure from traditional equal protection standards.

We believe that this case presents a good and proper opportunity to do just that.

We do not suggest that this reexamination need go all the way back to *Shapiro*, nor even necessarily to *Zobel* and *Hooper*, for we recognize that rights and interests founded upon that line of decisions probably should remain undisturbed. However, for the reasons stated below, we do suggest that it may and should begin quite effectively and properly at *Soto-Lopez*.

1. The question of the constitutionality of state veterans' "residence at time of entry" requirements should be, but has not been, settled definitively by this Court.

As shown above, both the California Court of Appeal and the California Supreme Court held that they were bound by recent decisions of this Court to find the California statute unconstitutional as being violative of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

In its holding, the Court of Appeal declared that it was bound by the doctrine of stare decisis and the interpretations of this Court of the constitutionality of "similar benefit programs," and specifically referred to *Zobel, Hooper, and Soto-Lopez*. (Appendix A-22).

The California Supreme Court declared that it was constrained by "recent decisions" of this Court to hold the statutes unconstitutional (Appendix A-1), and specifically identified these decisions as *Zobel*(Appendix A-5), *Hooper* (Appendix A-7), *Williams* (Appendix A-8), and *Soto-Lopez* (Appendix A-9).

a. The Zobel Case.

In *Zobel*, this Court struck down a 1980 Alaska statute providing for annual distribution of a portion of the state's windfall oil revenues to its citizens.

The statute set an initial value of $50 for a "dividend unit," and provided that each adult resident would receive one dividend unit for each year of residency after 1959, the year of statehood.

(Then) Chief Justice Burger, delivering the opinion of the Court, applied the minimum rationality test and found that the statute violated the guarantees of the Equal Protection Clause. *Zobel*, 457 U.S. 55, 65.

However, Justice Brennan, joined by Justice Marshall, Justice Blackmun, and Justice Powell, delivered a concurring opinion which appears to apply "intensified scrutiny" and to find the statute unconstitutional as violative of the right to migrate. *Zobel*, 457 U.S. 55, 66-67. Justice O'Connor filed a concurring opinion

which finds the statute unconstitutional as violative of the Privileges and Immunities Clause. *Zobel*, 457 U.S. 55, 78.

(Then) Justice Rehnquist was the lone dissenter in this case. He criticized the majority for not giving the usual deference to state economic regulations, *Zobel*, 457 U.S. 55, 82, and concluded that the statute passed both equal protection and privileges and immunities muster. *Zobel*, 457 U.S. 55, 83-84.

Here, it appears that the Court treated the statute as imposing a durational residency requirement, for it created distinctions among residents "... based on how long they have been in the state." *Zobel*, 457 U.S. 55, 58.

b. The Hooper Case.

In *Hooper*, this Court struck down a 1981 New Mexico statute providing annual property tax exemptions for Vietnam veterans who had resided in the state before May 8, 1975 (later amended to May 8, 1976).

(Then) Chief Justice Burger, delivering the opinion of the Court, applied the minimum rationality test and found that the statute violated the guarantees of the Equal Protection Clause. *Hooper*, 472 U.S. 612, 624.

Significantly, however, in this opinion, the Court specifically observed that veterans' benefit statutes which condition eligibility on state residence at the time of induction into the military had survived equal protection challenges long before *Zobel*, and not only expressly reserved the question of the constitutionality of this kind of statute, *Hooper*, 472 U.S. 612, 621 n11, but also based its finding of irrationality in part upon the fact that the New Mexico statute was not "... written to require any connection between the veteran's prior residence and military service." *Hooper*, 472 U.S. 612, 622.

Justice Powell took no part in the decision of the case, and Justice Brennan filed a brief concurring opinion which incorporated his concurring opinion in *Zobel*. *Hooper* 472 U.S. 612, 624.

Justice Stevens, joined by (then) Justice Rehnquist and Justice O'Connor, dissented.

The dissent demonstrated that the New Mexico statute at issue in *Hooper* was quite different from the Alaska statute in *Zobel*, criticized the Court's entire analysis as being defective in several respects, and concluded that there was no substance to the claim that the New Mexico statute violated the principles of equality embodied in the Equal Protection Clause. *Hooper*, 472 U.S. 612, 633.

Here, it appears that the Court treated the statute as imposing a single "fixed-point" residency requirement, for it involved " . . . a distinction between residents based on when they first established residence in the State." *Hooper*, 472 U.S. 612, 618 n6.

c. The Williams Case.

The California Supreme Court characterized the Williams case as one in which this Court "invalidated a Vermont use tax exemption on out-of-state purchases of cars." *Del Monte*, 4 Cal.Rptr.2d 826, 831. (Appendix A-8). However, as shown below, the actual holding was much narrower.

Vermont collected a use tax when cars were registered, but the tax was not imposed if the car was purchased in Vermont and a sales tax had been paid.

If the car was purchased in another state, the tax was reduced by the amount of any sales or use tax paid in that state if that state had a reciprocal arrangement with Vermont, but this credit was available only to a registrant who was a Vermont resident at the time the out-of-state tax was paid.

Justice White, delivering the opinion of the Court, declared that no legitimate purpose could be perceived which was furthered by the exemption, and appeared to hold that the statute violated the Equal Protection Clause. *Williams*, 472 U.S. 14, 23, 27.

However, the action below had been dismissed on the pleadings (for failure to state a claim) before an answer was filed, and the Court, characterizing its holding as "quite narrow" and conceding that upon trial it might turn out that the statute did not operate in a discriminatory fashion, actually held only that when the statute

was viewed on its face, the appellants had stated a claim of "unconstitutional discrimination." *Williams*, 472 U.S. 14, 27, 28.

Once again, Justice Powell took no part in the decision of the case, and Justice Brennan filed a brief concurring opinion incorporating his concurring opinion in *Zobel*. *Williams*, 472 U.S. 14, 28.

Justice Blackmun, joined by (then) Justice Rehnquist and Justice O'Connor, dissented.

The dissent criticized the Court's opinion severely for imagining a "fanciful hypothetical discrimination," *Williams*, 472 U.S. 14, 29, for subjecting the Vermont statute "to a kind of microscopic scrutiny that few enactments could survive," Williams, 472 U.S. 14, 31, for making a "noncase . . . seemingly attractive by high-sounding suggestions of inequality," *Williams*, 472 U.S. 14, 36, and concluded that the statute was "manifestly rational." *Williams*, 472 U.S. 14, 37.

It is not clear how the Court regarded this residency requirement, but it does not appear to be either a durational or a single "fixed-point" requirement. In any case, because of its narrow holding, it is simply not applicable here.

d. The Soto-Lopez Case.

Finally, we come to the *Soto-Lopez* case, in which this Court struck down a New York statute granting veterans' preference points in civil service examinations to veterans who were residents of New York when they entered military service.[14]

In *Soto-Lopez*, no opinion of the Court was delivered. Rather, Justice Brennan announced the judgment of the Court and delivered a plurality opinion.

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[14] The same statute came before this Court in 1974 and was upheld against the same constitutional challenges, *August v. Bronstein*, 369 F.Supp. 190 (S.D.N.Y.), summarily affirmed by 417 U.S. 901, 94 S.Ct. 2596, but *Soto-Lopez* was the first (and so far, the only) time the Court has considered the constitutionality of this kind of residency requirement, other than summarily.

Justice Brennan, joined by Justice Marshall, Justice Blackmun, and Justice Powell, immediately concluded that the statute implicated the right to migrate or "right to travel," subjected it to "heightened scrutiny," and concluded that New York had not met its burden of proving a "compelling state interest." *Soto-Lopez*, 476 U.S. 898, 911.

(Then) Chief Justice Burger delivered an opinion concurring in the judgment, but expressly rejecting the plurality's "right to travel" analysis and concluding instead that the statute failed under a "rational basis" test. *Soto-Lopez*, 476 U.S. 898, 913. Justice Burger also criticized the plurality for departing from the traditional approach to equal protection analysis by addressing the "right to migrate" and applying "heightened scrutiny" without first determining whether the statute would survive "rational basis" analysis. *Soto-Lopez*, 476 U.S. 898, 912.

Justice White filed a brief opinion concurring in the judgment, but expressly rejecting the plurality's conclusion that the statute implicated the right to travel, and agreeing with (then) Chief Justice Burger that the classification was "irrational." *Soto-Lopez*, 476 U.S. 898, 916.

Justice O'Connor, joined by (then) Justice Rehnquist and Justice Stevens, filed a strong, well-reasoned dissent concluding that the statute did not violate the Equal Protection Clause, that it did not violate the "right to migrate," and that it did not violate the Privileges and Immunities Clause. *Soto-Lopez*, 476 U.S. 898, 918.

As did Justice Burger, Justice O'Connor criticized the plurality for departing from the traditional approach to equal protection analysis, and observed quite correctly that the plurality did not "... make clear how much of its analysis is necessary or sufficient to find a violation of the "right to migrate" independently of an Equal Protection Clause violation." *Soto-Lopez*, 476 U.S. 898, 919.

Justice Stevens also filed a separate dissent explaining cogently why *Hooper* did not require the Court to find the New York statute unconstitutional, observing (as pointed out above) that the *Hooper* Court was careful to reserve the question of this kind

of residency requirement, and criticizing the Court for leaving the question open in *Hooper* and then asserting in *Soto-Lopez* that *Hooper* had resolved it. *Soto-Lopez*, 476 U.S. 898, 917-918.

Thus, in *Soto-Lopez*, we have a decision of a divided Court. Only four justices declared the statute unconstitutional on "right-to-travel" grounds. Two justices expressly rejected the "right-to-travel" implication but declared it unconstitutional on equal protection grounds.

Three justices said that the statute passed muster under "rational basis" analysis and did not implicate the "right to travel" sufficiently, if at all, to trigger "heightened scrutiny." In addition, we have at least four justices[15] criticizing the plurality of four for departing from the traditional approach to equal protection analyses, as well as one justice directly criticizing them for " . . . marching in the wrong direction." *Soto-Lopez*, 476 U.S. 898, 918.

In discussing the effect of the divided decision in *Soto-Lopez* on the instant case, the California Supreme Court relied on *Marks v. United States* (1977) 430 U.S. 188, 97 S.Ct. 990, and seemed to conclude that it was bound by *Marks* because six justices in *Soto-Lopez* "clearly held the New York law . . . was unconstitutional." (Appendix A-35). In *Marks*, this Court discussed the effects of its divided decisions, and said:

> "When a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the case may be viewed as that position taken by those members who concurred in the judgment on the narrowest possible grounds." *Marks*, 430 U.S. 188, 193, citing *Gregg v. Georgia* (1976) 428 U.S. 153, 169 n15, 96 S.Ct. 2909.

In *Gregg*, this Court held for the first time that the "punishment of death does not invariably violate the Constitution." *Gregg*, 428 U.S. 153, 169. The Court observed that this question was confronted squarely for the first time in *Furman v. Georgia*

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[15] Although Justice White did not explicitly criticize the plurality for departing from the traditional approach, he did disagree with them on the "right-to-travel" implication.

(1972) 408 U.S. 238, 92 S.Ct. 2726 but was not resolved because four justices would have held that capital punishment was not unconstitutional per se, two justices would have reached the opposite conclusion, and three justices, while agreeing that the statutes then before the Court were invalid as applied, left open the question whether capital punishment may ever be applied. The Court observed further that although five justices wrote separately in support of the judgment in *Furman*, all five agreed that where discretion is afforded a sentencing body as to capital punishment, that discretion must be suitably directed and limited. *Gregg*, 428 U.S. 153, 188 n36, 189.

This kind of "narrowest possible ground" is simply not evident in *Soto-Lopez*. The Respondents in the instant case argued below (and the California Supreme Court apparently agreed) that the four justices who subscribed to the plurality opinion in *Soto-Lopez* would have agreed with (then) Chief Justice Burger and Justice White that the New York statute would not survive even a "minimum rationality" analysis. In fact, however, the four justices did not so agree, for if they had, why then did they subject the statute to the stricter "heightened scrutiny" standard without first applying the more lenient "minimum rationality" standard?

What, then, was the "narrowest possible ground" upon which the six members in *Soto-Lopez* concurred? It cannot be simply that the statute was "unconstitutional," for that would be far too broad a ground for a meaningful holding.

Could it be that the statute was violative of equal protection? Possibly, but the plurality based its conclusion solely upon its "right-to-travel" analysis and, as Justice O'Connor pointed out, seemed to regard that as an independent ground, or at least did not make it clear whether it was independent of an equal protection ground. Furthermore, the plurality applied an entirely different standard in reaching its conclusion than that applied by the two concurring justices.

Again, it is not clear how the Court regarded this residency residency, but it *is* clear that it is neither durational nor based upon a single fixed point in time.

e. Summary.

Unlike the statutes in *Zobel* and *Hooper*, California's statute is longstanding, having been enacted over 70 years ago, and it does not establish either a durational or a single "fixed-point" residency requirement. Rather, like the New York statute, it establishes a residency requirement based upon each individual veteran's entry into active duty and, as shown above, "entry into active duty" includes not only the original entry but also later entries or re-enlistments.

Therefore, there is no requirement for residence of a specific duration; the time established for residence varies from veteran to veteran; and a veteran may enter originally from another state, move or be transferred to California, establish residence in California, re-enter or re-enlist, and qualify fully for the benefit.

Furthermore, unlike the statute in *Hooper*, California's statute is written precisely to require a connection between prior residence and military service.

In summary, the question presented for review was not settled by *Zobel*, *Williams*, and *Hooper* because the circumstances and statutes in those cases are clearly distinguishable from those of the present case, because *Hooper* expressly reserved the question, and because the very nature of the decisions in those cases leaves the question unsettled. The question was not settled by *Soto-Lopez* because no single rationale explaining the result was agreed upon by a majority of the justices and, at best, the holding in that case is unclear.

2. The question presented for review involves a matter of great public importance which calls for the exercise of this Court's supervisory powers over the development of federal constitutional law.

California is not the only state with a veterans' home loan program. Alaska, Mississippi, Oregon, Texas, and Wisconsin also have similar veterans' loan programs with similar residence re-

quirements.[16] Almost all the states have some kind of veterans' benefit program, and most such programs have some kind of residence requirement.

The states also have other economic and social policies and programs with varying types of residence requirements. Prior to *Zobel*, this Court had readily upheld some of those requirements. For example, as Justice O'Connor pointed out in her dissent in *Soto-Lopez*, the Court has summarily upheld residence requirements for state college tuition rates, for scholarship assistance, and for dissolution of marriage. *Soto-Lopez*, 476 U.S. 898, 923.

Yet, as indicated above, the line of cases beginning with *Shapiro* and ending with *Soto-Lopez* (n13) has resulted in a trend toward the striking down of ever narrowly drawn residency requirements, for a broad variety of ever less "fundamental" or "significant" state benefits.

And, these cases have been decided with a confusing mixture of "right to travel" and equal protection opinions, which seem to be moving steadly away from the Court's traditional approach to equal protection analyses, as well as from its traditional deference to states' regulation of their own social and economic programs,[17] but for which critical and separate concurring opinions and dissenting opinions have been abundant.

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[16] *Alaska Stats.* Sec. 26.15.130; *Miss. Stats.* Sec. 35-7-5; *Or. Const.* Art. 11(a), Sec. 3; *Tx. Nat. Res. Code* Sec. 162.001; and *Wi. Stats. 45.71.*

[17] Petitioners are aware of the general rule that in cases where there is a clash between the Fourteenth Amendment and the Tenth Amendment, the Tenth Amendment must yield. See, e.g., *Hunter v. Underwood* (1985) 471 U.S. 222, 104 S.Ct. 1916. However, Petitioners do not agree with the view of some that the Tenth Amendment "states but a truism." See, e.g., *United States v. Darby* (1941) 312 U.S. 100, 61 S.Ct. 451. We believe that the Tenth Amendment is still alive and vital (even if not fully well), that its plain language clearly reflects the important principles of federalism upon which our government is founded, and that these principles should be considered seriously in determining whether or how far we should depart from this traditional deference.

Justice O'Conner characterized the Court's approach in *Soto-Lopez* as a "new dual analysis," observing that it had rejected "the equal protection approach the Court has previously employed in similar cases, . . . without bothering to explain why this novel use of both 'right to migrate' analysis and strict equal protection scrutiny is more appropriate, necessary or doctrinally coherent," *Soto-Lopez*, 476 U.S. 898, 919, and that even *Shapiro* had "left unclear the amount of impact on the right to travel which is necessary to give rise to . . . heightened scrutiny." *Soto-Lopez*, 476 U.S. 898, 921. Thus, the same lack of clarity in *Shapiro* was still evident 17 years later in *Soto-Lopez*.

CONCLUSION

The inescapable conclusion is that our federal constitutional law on equal protection and state residency requirements is still unsettled, but is moving in a direction about which there is substantial and legitimate concern and disagreement.

Petitioners believe that this Court should grant review to settle the question and to exercise its supervisory powers to determine where we are, where we are going, and whether we are going in the right direction down this important constitutional road.

For the foregoing reasons, the writ of certiorari should be allowed.

Respectfully submitted,

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(2)

91-1885

No.

SUPREME COURT, U.S.
MAY 21 1992
OFFICE OF THE CLERK

In The Supreme Court

OF THE

United States

OCTOBER TERM, 1991

PETE WILSON, in his official capacity as Governor of the State of California; BENJAMIN T. HACKER, as Director of the State Department of Veterans Affairs; STATE DEPARTMENT OF VETERANS AFFAIRS; and THE STATE OF CALIFORNIA,
Petitioners,

v.

CHARLES DEL MONTE, NICHOLAS DEL MONTE, ANDREW DEL MONTE, and MICHAEL GURECKAS, Individually and on Behalf of the Class They Represent; JOAN DEL MONTE, KARL SEUTHE, CLYDE MCCOWN, and JOHN RIGNEY, Individually and as Tax Payers,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California

APPENDIX

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Appendix A

In the Supreme Court of the
State of California

CHARLES DEL MONTE et al.,
Plaintiffs and Appellants,

v.

PETE WILSON, as Governor, etc. et al.,
Defendants and Respondents.

S021805

Ct.App. B040513

Super.Ct. No. CA 001096

[Filed Feb. 24, 1992]

I

We are to decide whether the distribution of veterans' benefits conditioned on California residency at a fixed point in the past violates the federal constitutional right to equal protection of the laws. We conclude that we are constrained by recent decisions of the United States Supreme Court to hold the statutes providing for such a distribution are unconstitutional.

II

Chapter 6 of the Military and Veterans Code, entitled "State Benefits for Veterans," provides for veterans' benefits including tuition and living expenses for students (Mil. & Vet. Code, § 980 et seq.), farm and home loan assistance (*id.*, §§ 985 et seq., 987.50), and disaster indemnity (§ 989.4 et seq.).[1] Defining eligibility for benefits under the chapter as a whole, section 980 provides in pertinent part:

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[1] All statutory references are to the Military and Veterans Code unless otherwise indicated.

"(a) As used in this chapter, 'veteran' means either of the following:

"(1) Any citizen of the United States who served in the active military, naval, or air service of the United States on or after April 6, 1917, and prior to November 12, 1918; received an honorable discharge or was released from active duty under honorable conditions; *was, at the time of entry into active duty, a native of or a bona fide resident of the state or, if a minor at that time, entered active duty while in this state; and had lived in this state for six months immediately preceding entry into active duty.*

"(2) Any person who served in the active military, naval or air service of the United States for a period of not less than 90 consecutive days or was discharged from the service due to a service-connected disability within that 90-day period; received an honorable discharge or was released from active duty under honorable conditions; *was at the time of entry into active duty a native of or bona fide resident of this state or, if a minor at that time, entered active duty while in this state and had lived in this state for six months immediately preceding entry into active duty;* and performed any portion of that service during any of the following periods:

"(A) On or after December 7, 1941, and prior to January 1, 1947.

"(B) On or after June 27, 1950, and prior to February 1, 1955.

"(C) On or after August 5, 1964, and prior to May 8, 1975.

"(D) In time of peace in a campaign or expedition for service in which a medal has been authorized by the government of the United States." (Italics added.)

In a separate chapter providing for education benefits for veterans' dependents, section 890 defines the term "veteran" as follows: "any person who served in the Army, Navy, or Marine Corps of the United States and was killed in action or died as a result of war service in the World War since April 6, 1917; (2) any member of the Army, Navy, Coast Guard or Marine Corps of the United States, or any of their auxiliaries who was killed in action in World War II on or after December 7, 1941, and prior to

January 1, 1947, or who died at any time as a result of war service during such period; (3) any member of the armed forces of the United States who was killed in action during any period of hostilities in which the United States is engaged, or who died or was totally disabled at any time as a result of active service during any such period or during the induction period; or (4) any person who, at the time of entry into the armed forces of the United States was a resident of this state and was subsequently declared by the United States government to be missing in action, captured in the line of duty by hostile forces, or forcibly detained or interned in the line of duty by a foreign government or power."

The Budget Act for many years has specified that no funds appropriated to provide assistance to veterans' dependents under section 890 et seq. shall be expended for the assistance of dependents of veterans not meeting the requirements of section 980. (See, e.g., 1990-1991 Final Budget Summary, Item No. 1960-001-001, p. 72-73; 1989-1990 Final Budget Summary, Item No. 1960-001-001, p. 103.)

Plaintiffs are veterans of World War II, the Korean War and the Vietnam War, and their dependents.[2] Respondent Department of Veterans Affairs refused them veterans' benefits on the ground that they had not been California residents at the time they entered military service.[3] On May 6, 1988, plaintiffs filed their petition for writ of mandate and complaint for declaratory and injunctive relief, and moved for class certification. They alleged that the restriction of veterans' benefits to persons who were California residents at the time they joined the military service was a violation of the federal constitutional guaranty of equal protection and the right to travel. They also claimed that the limitations on expenditures in the Budget Act was a violation

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[2] Also named as plaintiffs and asserting standing as taxpayers are the spouse of a veteran and three veterans who joined active service as residents of other states.

[3] Also named as respondents are the Governor of the State of California; Jesse Ugalde, Director of the Department of Veterans Affairs; and the State of California. This case was previously entitled *Del Monte* v. *Deukmejian*.

of the single-subject rule of the California Constitution, and that the arbitrary methods by which the Department of Veterans Affairs had considered their claims violated the federal constitutional guaranty of due process.[4]

The trial court found that plaintiffs had standing, but entered a judgment denying the petition and rejecting plaintiffs' constitutional claims. The Court of Appeal reversed and remanded with directions to issue the peremptory writ of mandate.[5] It held that the distinction drawn by the statutes violates the equal protection clause of the federal Constitution. It did not reach the question whether the statutes also violate the federal constitutional right to travel, or whether the item in the Budget Act violates the single-subject rule of the California Constitution. It held that the Department of Veterans Affairs failed to provide adequate procedural safeguards in denying benefits to dependents of veterans, and that the Military and Veterans Code must be interpreted to extend the veterans' procedural safeguards to applicants who are the dependents of veterans. Respondents petitioned for review, challenging only the holding that the statutes violate the federal constitutional guaranty of equal protection.

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[4] Plaintiffs' complaint originally challenged the constitutionality of article XIII, section 3, subdivision (o), of the California Constitution, which at the time of the filing of the complaint provided for a property tax exemption for veterans who had been residents of California before November 3, 1964. Proposition 93 on the November 1988 General Election ballot proposed deleting the residency requirement because it was unconstitutional under *Hooper* v. *Bernalillo County Assessor* (1985) 472 U.S. 612 (hereafter *Hooper*), and *Attorney General of N.Y.* v. *Soto-Lopez* (1986) 476 U.S. 898 (hereafter *Soto-Lopez*). (Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 1988), p. 61.) The measure passed, and the complaint was amended to omit the claim.

[5] Respondents did not renew their claim, either in the Court of Appeal or in this court, that plaintiffs lack standing or that their claim is barred by the statute of limitations.

III

As we are called upon to determine whether the statutory scheme at issue here violates the equal protection clause of the United States Constitution, we reiterate the fundamental tenet of our jurisprudence that unless a statute impairs fundamental rights or involves an inherently suspect classification, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." (*Cleburne* v. *Cleburn Living Centre* (1985) 473 U.S. 432, 439; see also *New Orleans* v. *Dukes* (1976) 427 U.S. 297, 303.)

Despite this established rule of judicial deference to legislative classifications, we observe that in recent years the United States Supreme Court has struck down several state statutes that distinguished between long-term residents and recent migrants to a state. The high court invalidated statutes that employed fixed-point residency requirements to determine eligibility for benefits, maintaining that the very purpose of these statutes to prefer or reward established residents is illegitimate. In three cases the court analyzed the matter purely as a question of equal protection; in the fourth, a divided majority of the court could not agree whether such a statute also violated the Constitutional right to travel, but struck down the state statute nonetheless. We feel constrained by these decisions to declare unconstitutional the statutes challenged here.

In *Zobel* v. *Williams* (1982) 457 U.S. 55 (hereafter *Zobel*), residents of Alaska attached a statute that distributed income derived from exploitation of its natural resources to its residents in amounts dependent upon the duration of their residence. The legislation granted residents one dividend unit from the state's natural resources fund for every year of residence after 1959, when Alaska joined the union.

The court determined that the statute did not reasonably further a legitimate state purpose. It determined that the justifications offered by the state were not rationally related to the distinction between recent and long-term residents. The asserted objective of tempting people to migrate to Alaska and stay was

not served by the statute, the court reasoned, because the statute placed a premium on decisions to migrate that were made during the 21 years before the statute was enacted. Nor did the court accept as rational the state's claim that the statute was intended to further the prudent management of the natural resources fund. Again, the court pointed out that a retroactive premium for long-term residents could not promote prudent management of a fund not yet in existence during most of that residency.

Of most moment to us is the court's treatment of the last justification offered by the State of Alaska. The state claimed that the statutory scheme rewarded residents for past contributions. The court flatly stated that this objective "is not a legitimate state purpose." (*Zobal, supra*, 457 U.S. at p. 63.) The court quoted its earlier decision in *Shapiro* v. *Thompson* (1969) 394 U.S. 618, 632-633, striking down a one-year residency requirement for receipt of welfare benefits: " 'Appellants' reasoning would . . . permit the State to apportion all benefits and services according to the past tax [or intangible] contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services.' " (Emphasis and bracketed material supplied by the court in *Zobel, supra*, 457 U.S. at p. 63.)

Concluding that Alaska had shown no *valid* state interests that are rationally served by the distinction, the *Zobel* court outlined the reductio ad absurdum of the state's position. "If the states can make the amount of a cash dividend depend on length of residence, what would preclude varying university tuition on a sliding scale based on years of residence — or even limiting access to finite public facilities, eligibility for student loans, for civil service jobs, or for government contracts by length of domicile? Could states impose different taxes based on length of residence? Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency. It would permit the states to divide citizens into expanding numbers of permanent classes. Such a result would be clearly impermissible." (*Zobel, supra*, 457 U.S. at p. 64, fns. omitted.)

Justice Brennan concurred in a separate opinion, joined by Justices Marshall, Blackmun, and Powell, arguing that the Alaska statute violated not only the equal protection clause but also the

constitutional right to travel. Justice O'Connor concurred in the judgment, arguing that Alaska's scheme violated the privileges and immunities clause of the United States Constitution. Justice Rehnquist, the lone dissenter, argued that economic regulation is entitled to great deference, and that the justifications offered by the state were sufficient to establish that the distribution scheme was rationally based.

The next case in the series is *Hooper, supra*, 472 U.S. 612, involving a preferential property tax exemption for veterans of the Vietnam War who had been residents of the State of New Mexico since May 8, 1976. The court observed that the statute created two classes of Vietnam War veterans: those who established residency before May 8, 1976, who qualified for the exemption, and those who arrived later, and thus did not qualify for the exemption.

The state asserted two justifications for the distinction, but the court found neither persuasive. The court rejected as irrational the claim that the statute encouraged veterans to settle in the state. The New Mexico Legislature enacted the eligibility date long after 1976: migration cannot be encouraged retroactively. Indeed, potential migrants may actually be discouraged by the distinction in benefits created by the statute. (*Hooper, supra*, 472 U.S. at p. 619.)

The state also argued that the statute was justified because it expressed the state's appreciation to "its own" for their military service. It is legitimate, said the high court, to compensate all veterans for their past contributions and for the disruption of their lives caused by military service. It is not legitimate, however, for the state to single out established residents and reward only them for their past contributions. (*Hooper, supra*, 472 U.S. at pp. 622-623.) "The State may not favor established residents over new residents based on the view that the State may take care of 'its own,' if such is defined by prior residence. Newcomers, by establishing bona fide residence in the State, become the State's 'own' and may not be discriminated against solely on the basis of their arrival in the State after May 8, 1976." (*Id.* at 623.)

The New Mexico statute made veterans who are recent arrivals members of a permanent category of second class citizens. "This discrimination on the basis of residence is not supported by any identifiable state interest; the statute is not written to benefit only those residents who suffered dislocation within the State's borders by reason of military service. *Zobel* made clear that the Constitution will not tolerate a state benefit program that 'creates fixed, permanent distinctions . . . between . . . classes of concededly bona fide residents, based on how long they have been in the State.' [Citation.] Neither the Equal Protection Clause, nor this Court's precedents, permit the State to prefer established resident veterans over newcomers in the retroactive apportionment of an economic benefit." (*Hooper, supra*, 472 U.S. at p. 623.)[6]

Justice Brennan noted that his concurrence was on the same basis as his concurrence in *Zobel, supra*, 457 U.S. 55 (*Hooper, supra*, 472 U.S. at p. 624 (conc. opn. of Brennan, J.), while Justice Stevens, joined by Justices Rehnquist and O'Conner, dissented. The dissent insisted that it is legitimate to provide benefits to some but not all Vietnam veterans because the resources of the state are limited. (*Id.* at pp. 626-627 (dis. opn. of Stevens, J.).) It also argued that the legislation rationally attempted to ameliorate hardships experienced by veterans seeking to be reintegrated into civilian life. (*Ibid.*)

In a third case, the Supreme Court invalidated a Vermont use tax exemption on out-of-state purchases of cars. (*Williams* v. *Vermont* (1985) 472 U.S. 14.) Only a person who was a Vermont resident at the time of the purchase was eligible for the exemption; the court agreed with those who bought cars outside the state before they became Vermont residents that the distinction between new and old residents was a violation of the equal protection of the laws. Although it recognized that the highest level of deference is owed to state taxation schemes, the court

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[6] *Hooper* reserved the question of the constitutionality of veterans' benefit statutes that condition eligibility on state residence at time of induction into the military, but implied that such statutes may also be unconstitutional. (*Hooper, supra*, 472 U.S. at pp. 621-622, fn. 11; see also *Bunyan* v. *Camacho* (9th Cir. 1985) 770 F.2d 773, 776.)

found no legitimate purpose could be furthered by the challenged distinction. "A State may not treat those within its borders unequally solely on the basis of their different residences . . . . [R]esidence at the time of purchase is a wholly arbitrary basis on which to distinguish among present Vermont registrants . . . ." (*Id.* at p. 23.) Justice Blackmun dissented, joined by Justices Rehnquist and O'Connor, arguing that the statute served legitimate ends.

In the most recent case to treat the problem of fixed-point residency requirements, six justices agreed that a system granting civil service preference points to veterans who entered active military service while residents of the State of New York violated the guaranty of equal protection of the laws. (*Soto-Lopez*, *supra*, 476 U.S. 898.) Four of the six justices agreed that the system also violated the constitutional right to travel. The plurality opinion reasoned that because the limitation of veterans' preference points to those who joined up from New York impaired the fundamental right to travel or migrate, a heightened level of scrutiny should apply to the statutory scheme. (*Id.* at pp. 905-906.) The plurality opinion identified the interest in civil service preference points as substantial, and pointed out that the statutory scheme deprived veterans who had joined up outside New York of the preference permanently.

New York offered four arguments in justification of the distinction drawn by the statute: "(1) the encouragement of New York residents to join the Armed Services; (2) the compensation of residents for service in time of war by helping these veterans reestablish themselves upon coming home; (3) the inducement of veterans to return to New York after wartime service; and (4) the employment of a 'uniquely valuable class of public servants' who possess useful experience acquired through their military service." (*Soto-Lopez*, *supra*, 476 U.S. at p. 909.)

Because the statute impaired the fundamental right to travel, the plurality opinion analyzed whether the statute was narrowly drawn to use the least intrusive means to achieve a compelling state purpose. (*Soto-Lopez*, *supra*, 476 U.S. at pp. 909-910.) As for the state's asserted justifications, because the preference applied to inductees as well as to enlistees, the court found the

first justification hollow. The second justification was unavailing because the preference points were available long after a veteran's return from war. Third, "[t]he State's failure to limit the credit to enlistees recently returned to New York from war strongly suggests that the State's principal interest is simply in rewarding its residents for service to their country." (*Id.* at p. 910.) Finally, all veterans, not just those who joined up from New York, possessed useful experience that could be valuable to the state. (*Id.* at p. 909.)

Though the interest in rewarding residents for their service to the country may be compelling, it did not justify the challenged distinction. "Members of the Armed Forces serve the Nation as a whole. While a serviceperson's home State doubtlessly derives indirect benefit from his or her service, the State benefits equally from the contributions to our national security made by other service personnel. 'Permissible discriminations between persons' must be correlated to 'their *relevant* characteristics.' [Citation.] Because prior residence has only a tenuous relation, if any, to the benefit New York receives from all Armed Forces personnel, the goal of rewarding military service offers no support for New York's fixed point residence requirement." (*Soto-Lopez*, *supra*, 476 U.S. at p. 911.)

Chief Justice Burger concurred in the judgment, maintaining that the New York statute failed to satisfy the rational basis test under the equal protection clause. (*Soto-Lopez*, *supra*, 476 U.S. at p. 913 (conc. opn. of Burger, C. J.).) He maintained that the statute could not survive a rational basis analysis: a person cannot be encouraged to enlist by a statute passed after enlistment; as the plurality opinion noted, the statute extended to draftees as well as enlistees. To the extent the statute was intended to partially compensate residents for war-time service, "*Hooper* clearly rejected any such retroactive rewards targeting only past residents" because all veterans are equally deserving of benefits. (*Id.* at p. 914 (conc. opn. of Burger, C. J.).) While the statute may have encouraged New York veterans to return to the state after service, it impermissibly discouraged other veterans from migrating to New York. (*Ibid.*) Finally, all veterans who were residents of New York, not just those who joined the military as New York

residents, brought special skills to their employment. (*Id.* at p. 915.) Justice White agreed with Chief Justice Burger that the statute denied equal protection because "the classification it employs is irrational." (*Soto-Lopez, supra*, 476 U.S. at p. 916 (conc. opn. of White, J.).)

Justice O'Connor wrote the lead dissenting opinion, joined by Justices Stevens and Rehnquist. She took the position she expressed in *Zobel, supra*, 457 U.S. at page 72 (conc. opn. of O'Connor, J.), that a state's desire to reward its citizens for past contributions is unconstitutional only when the execution of this goal would abridge the right to migrate, which she would locate in the privileges and immunities clause of article IV, section 2 of the United States Constitution. She found no violation of the equal protection clause in the New York scheme, and found that the statute would not have such an impact upon the right to travel as to require its invalidation under the privileges and immunities clause. (*Soto-Lopez, supra*, 476 U.S. at pp. 919-920 (dis. opn. of O'Connor, J.).) Justice Stevens wrote separately to argue that the narrower the minority of persons to whom a statute grants special privileges, the less of a concern the statute should be, because "[i]n a democracy the majority will seldom treat itself unfairly." (*Id.* at p. 916 (dis. opn. of Stevens, J.).)

The statutory scheme at issue here is similar to the New York statute. Benefits are available only to a certain class of resident veterans, that is, to those who were California natives or residents at the time they entered active military service. Other resident veterans, because they were not residents of the state at a fixed point in the past, are for all practical purposes permanently denied benefits. Thus, a disabled World War II veteran who moved to California shortly after the war would be ineligible for the benefits, no matter how long he resided in the state, paid taxes here, and made other contributions to our society.

We must determine whether this classification is rationally related to a legitimate state purpose. Respondents claim that the distinction drawn by the statutes between veterans who were California natives or residents when they joined up and veterans who joined up from other states is justified because California may choose to "take care of its own." The high court has rejected

this purpose as illegitimate. (*Soto-Lopez*, *supra*, 476 U.S. at pp. 911 (plur. opn. of Brennan, J.), 916 (conc. opn. of Burger, C. J.); *Hooper*, *supra*, 472 U.S. at p. 623.) Respondents maintain that "California may feel quite properly that it has no obligation, moral or otherwise, to provide veterans' benefits to those who were citizens of another state when called to service, and that each state should determine how to take care of its own with regard to veterans' benefits." Our answer to this claim is simply that once a citizen becomes a bona fide resident of this state, he or she becomes the state's "own" to the same extent as a longer-term resident. (*Soto-Lopez*, *supra*, 476 U.S. at pp. 911 (plur. opn. of Brennan, J.), 915-916 (conc. opn. of Burger, C. J.); *Hooper*, *supra*, 672 U.S. at p. 623.)

Respondents also assert that the statutory scheme is justified because it compensates and provides assistance to those who were residents when they made the sacrifice of entering active military service. Respondents claim that the scheme compensates those whose careers and lives are disrupted "while they are working and living in the state, and who choose to return to their home state after their military service where they must begin the difficult task of resuming those interrupted careers and lives, ill-prepared and to begin anew in a society and economy which may have changed dramatically during their absence and which may have left them far behind."

This contention, however well-meaning, was expressly rejected in *Hooper*, supra, 472 U.S. 612: "Those who serve in the military during wartime inevitably have their lives disrupted; but it is difficult to grasp how New Mexico residents serving in the military suffered more than residents of other States who served, so that the latter would not deserve the benefits a State bestows for national military service. Moreover, the legislature provided this economic boon years after the dislocation occurred. Established state residents, by this time, presumably had become resettled in the community and the modest tax exemption hardly bears directly on the transition to civilian life long after the war's end. Finally, the benefit of the tax exemption continues for the recipient's life. The annual exemption, which will benefit this limited group of resident veterans long after the wartime disrup-

tion dissipated, is a continuing bounty for one group of residents rather than simply an attempt to ease the veteran's return to civilian life.

"Even assuming that the State may legitimately grant benefits on the basis of a coincidence between military service and past residence, the New Mexico statute's distinction between resident veterans is not rationally related to the State's asserted legislative goal. The statute is not written to require any connection between the veteran's prior residence and military service. Indeed, the veteran who resided in New Mexico as an infant long ago would immediately qualify for the exemption upon settling in the State at any time in the future regardless of where he resided before, during, or after military service." (*Hooper, supra,* 472 U.S. at pp. 621-622, fns. omitted.)

Thus, *Hooper, supra,* 472 U.S. 612, requires that we reject the justifications proffered by the state. Obviously the state may choose to honor and reward veterans, and thus may discriminate between veterans and nonveterans in the allocation of benefits. (*Id.* at p. 620.) But a statute that divides veterans into two classes, with greater benefits for prior residents, cannot be justified. All current residents are California's "own"; the life of every veteran has been disrupted by active military service; veterans who joined the military as residents of California suffered no more than others who joined as residents of other states and subsequently migrated to California. And the state owes a debt of gratitude to every veteran, regardless of state of origin.

Furthermore, again as in *Hooper, supra,* 472 U.S. 612, the statutory scheme is not drawn in such a way as to promote reintegration into civilian life; its benefits may first be claimed up to 30 years after discharge. (§§ 986.01 [25 years], 987.57 [30 years].) The statutory scheme provides benefits far beyond the period of actual disruption and reintegration, even into the second generation. The benefit of a low-interest loan is not limited to the period after demobilization, but is available for a further 30 years after discharge. Moreover, the benefit of the loan extends over the entire life of the mortgage. Further, the statute requires no connection between the veteran's prior residence and his or her military service; a native Californian veteran is apparently entitled

to the benefits regardless of actual residence before entry into service. (§ 980, subd. (a)(2).)

Our scheme may be distinguished from the element of the New Mexico scheme attacked in *Hooper, supra,* 472 U.S. 612, in that it was not enacted long after the military conflict, but has been part of our law since 1943. Thus, unlike the benefits attacked in *Zobel, supra,* 457 U.S. 55, and *Hooper, supra,* 472 U.S. 612, it is not a completely retroactive bounty, but may have served to encourage residents to return to California after active service. Further, the modest educational benefit is more closely related to reintegration into the peacetime economy than a tax exemption. Nonetheless, it is available long after the period of reintegration — for a lifetime, in fact. As we have noted, the home and farm loan benefits may be applied for up to 30 years after discharge. The benefit for dependents of veterans cannot be justified as mitigating warfare disruption. The intent of the entire scheme, as the state frankly admits, is to benefit the state's "own." We can only conclude that it has been the role of the four Supreme Court cases discussed above to dismantle a provincial view of citizenship.

Respondents ask us to observe the usual rule that economic legislation is accorded wide deference when it is claimed that a statutory classification violates the equal protection clause. As commentators, and indeed the dissenting justices, have observed, the majority in *Zobel* and *Hooper* did not apply the deferential equal protection analysis usually extended to state statutes regulating economic affairs. (See Tribe, American Constitutional Law (1988) § 16-3, pp. 1441-1443, and fn. 16; Note, *State Parochialism, the Right to Travel, and the Privileges and Immunities Clause of Article IV* (1989) 41 Stan.L.Rev. 1557, 1588; Swierenga, *Still Newer Equal Protection: Impermissible Purpose Review in the 1984 Term* (1986) 53 U.Chi.L.Rev 1454; Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination* (1987) 135 U.Pa.L.Rev. 261, 321; *Hooper, supra,* 472 U.S. at p. 627 (dis. opn. of Stevens, J.); see also *Soto-Lopez, supra,* 476 U.S. at pp. 924-925 (dis. opn. of O'Connor, J.) Rather, the high court was mostly concerned to identify the central object of the statutes, that is, preferring long-term re-

sidents over recent migrants, as illegitimate. The plurality and concurring opinions in *Soto-Lopez* expressed the same view. The statutes considered here have the same basic flaw. We have been presented with no justification that would satisfy the concerns of the high court expressed in the cases discussed above.

Respondents seek to distinguish this case from *Zobel, supra*, 457 U.S. 55, and *Hooper,* supra, 472 U.S. 612, on the ground that "the purpose of California's statute clearly is not to reward previous residents for past contributions, for it also provides benefits for veterans who now enter into active duty, and for current and future residents who may serve in a future military campaign." To the extent this argument refers to those who may serve in the future, it confuses the classes of similarly situated individuals who are being compared for the purpose of the equal protection analysis; we are comparing two classes of resident veterans, not present veterans and those who have not yet served. We agree with the Court of Appeal that respondents' argument cannot save the statute; a World War I or World II veteran can hardly be expected to reenter active service at this late date, nor should that veteran be required to do so in order to receive the benefits flowing from the earlier service to our country. There is no legitimate justification for according benefits to those veterans who were earlier residents of California, but requiring veterans who arrived more recently to fight another war in order to qualify for the same benefits. Nor can we overlook the fact that many veterans, including two of the plaintiffs in this case, were totally disabled as a result of their wartime service and thus can never take advantage of respondents' unrealistic offer that they reenlist for active service in order to obtain the veterans benefits at stake here.

Respondents also ask us to disregard *Soto-Lopez, supra*, 476 U.S. 898, because the plurality and concurring opinions did not employ the same rationale in agreeing to strike down the statute there in issue. We are not persuaded. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds . . . .' " (*Marks* v. *United*

States (1977) 430 U.S. 188, 193.) Thus the decision of the high court should not be rejected as meaningless; at its narrowest, it at least rejects the New York statute as lacking a rational basis. And, as we have noted, the plurality and concurring opinions coincide at several points in rejecting the justifications offered by the state in support of its statute.

Respondents ask us to waive what they term the "policy of stare decisis" and to uphold the statutory scheme on the ground that it has been part of our state's law for many years, and has never before been judicially questioned. Such an approach is not within our power. The high court is the arbiter of the federal constitutionality of state statutes (*Martin* v. *Hunter's Lessee* (1816) 14 U.S. (1 Wheat.) 304), and its decisions interpreting the federal Constitution are the supreme law of the land. (*Cooper* v. *Aaron* (1958) 358 U.S. 1, 18.) Thus we must apply the doctrine fashioned by the United States Supreme Court regardless of the antiquity of our statutes.

We have considered the thoughtful decision of the trial court upholding the veterans' benefits scheme. The court reasoned that veterans who move to California after military service receive generous benefits from the federal government and these federal benefits assure that all veterans have the maximum freedom to migrate from state to state. The court asserted that some veterans who migrate to California after their military service are also eligible for some state veterans' benefits and that not all veterans who joined the service as California residents are eligible for the state benefits. Accordingly, the court concluded that not only do the statutes have only a minimal impact on the right to travel, but also the statutory scheme does not create two fixed categories of residents, one of which is treated as "second class."

We have examined the statutory scheme, and have concluded that the state benefits available to those who were not natives or residents of the state at the time of entering active military service are extremely limited. There is a provision for postgraduate study benefits for the child of a veteran of World War II who was killed in action, provided the child speaks two Chinese dialects and has not attained the age of 32 by December 1, 1969. (§ 897.) Section 32320 of the Education Code allows for a tuition waiver for

dependents of low-income veterans, but the complaint alleges that no funds are allocated under this provision because of the Budget Act limitations of which plaintiffs complain. There is also a provision that a person of Japanese ancestry is considered a veteran if the person was a resident of California and was "evacuated" pursuant to Presidential Executive Order No. 9066 of February 1942, an a similar provision that the child of such a person is to be considered a native of California even if born elsewhere during the period of evacuation. (§§ 980.1, 980.2.) Finally, there is the provision noted above that a veteran who was not a resident at the time of joining active service may qualify as a California veteran by continuing or renewing active service while in the state. (§ 987.52.)

As we have said, these exceptions are too narrow to persuade us that the statutory scheme does not discriminate between established residents and more recent arrivals. Furthermore, the trial court appears to have taken the position of Justice O'Connor's dissenting opinion in *Soto-Lopez*, supra, 476 U.S. at pages 921-923 (dis. opn. of O'Connor, J.).) Like Justice O'Connor, it insists that the impairment of the right to migrate caused by the statute is not significant enough to invalidate the statute. She argued, too, that the New York scheme did not create permanent classes of persons who would always be treated differently; a veteran who was a recent migrant to New York could qualify for a civil service position without the benefit of veterans' points, and a long-time resident veteran might fail to qualify even with veterans' points. (*Ibid.*) This, however, was the view of a dissenter. The majority in the four cases cited held that the allocation of benefits on the basis of prior residency violates the equal protection clause, on any of the justifications offered by the state here. The majority were concerned not just with immutable classes, but with the spectacle, viewed as foreign to the idea of the Union, that states could adopt a policy of viewing only long-term residents as the state's "own."

The trial court also emphasized the supplemental nature of the California veterans' benefits, asserting that the California home loan benefit cannot be claimed if similar federal benefits have been claimed. It also cited the provision of 26 United States Code

section 143(d), limiting eligibility for state veterans' benefits to one who has not owned a home for three years or is buying a home in a designated target area. The court further pointed out that the benefits are not automatic even for veterans who joined up from California; section 986 sets out three levels of preference for benefits, starting with wounded or disabled veterans: "Such California legislation shows that the Cal Vet program is secondary, limited and narrower in benefit, vis-a-vis the primary Federal programs." This discussion, however, appears to follow the reasoning of Justice Stevens's dissent in *Soto-Lopez*, *supra*, 476 U.S. at pages 916-918. He argued that the narrower the special benefit, the less is the equal protection concern. This argument fails to take into account the apparent view of the majority of the high court that however narrow the benefits, there is no legitimate justification for limiting them to long-term residents.

Because the statutes at issue here are closely analogous to those reviewed in *Hooper* (*supra*, 472 U.S. 612) and *Soto-Lopez* (*supra*, 476 U.S. 898), and because the justifications offered by the state for the statutory classification were expressly rejected in those decisions, we conclude that our statutory scheme is not rationally related to achieving a legitimate state purpose, and hence violates the federal equal protection clause.

Our decision is consistent with that of the Ninth Circuit in *Bunyan* v. *Camacho, supra*, 770 F.2d 773. There the court overturned a Guam statute according retroactive retirement credits to local government employees who were Guam residents before they started college. Applying *Hooper, supra*, 472 U.S. 612, the court determined that although Guam may legitimately decide to reward its residents who obtained higher education and entered Guamanian civil service, rewarding only "established" residents was not a legitimate purpose. It also explained that the Guam statute improperly created " 'fixed, permanent distinctions between . . . classes of concededly bona fide residents.' " (*Bunyan* v. *Camacho, supra*, 770 F.2d at p. 776.) The court, in dictum, also read *Hooper* as strongly implying that veterans' benefits statutes that condition eligiblilty on state residence at the time of induction would be held violative of the equal protection clause. (*Ibid.*; see also *E. & E. Const. Co.* v. *State of Ill.* (N.D.Ill. 1987)

674 F.Supp. 269 [plaintiffs stated a claim for violation of equal protection because state statute prefers those who have resided in Illinois for 30 days for public works employment]; cf. *Hoffman* v. *City of Warwick* (1st Cir. 1990) 909 F.2d 608 [upholding seniority credit for reemployed veterans — no residency requirement].)

IV

We affirm the decision of the Court of Appeal that to the extent Military and Veterans Code sections 890 and 980 and the yearly Budget Act limit state veterans' benefits to those who were natives or residents of the state at the time of entry into active service, these provisions are invalid as violative of the equal protection clause of the Fourteenth Amendment of the United States Constitution.

" 'Where a statute is defective because of underinclusion . . . there exist two remedial alternatives: a court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are agrieved by the exclusion.' " (*Califano* v. *Westcott* (1979) 443 U.S. 76, 89, quoting conc. opn. of Harlan, J., in *Welsh* v. *United States* (1970) 398 U.S. 333, 361.) Being guided by the intent of the Legislature to aid veterans, and the agreement of the parties that extension of benefits is the appropriate remedy, we direct that the second remedial alternative be embraced.

We affirm the judgment of the Court of Appeal and remand to the Court of Appeal with directions to remand the cause to the superior court for further proceedings not inconsistent with this opinion.

MOSK, J.

WE CONCUR: LUCAS, C.J.
PANELLI, J.
KENNARD, J.
ARABIAN, J.
BAXTER, J.
GEORGE, J.

S021805

CHARLES DEL MONTE

v.

GEORGE DEUKMEJIAN

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TRIAL COURT: Los Angeles County Superior Court

TRIAL COURT#: CA001096

The information provided here is not intended to reflect that which will appear in official reports.

Appendix B

In the Court of Appeal of the
State of California

Division Seven

B040513

(L.A.S.C. CA001096)

[Filed May 23, 1991]

CHARLES DEL MONTE, NICHOLAS DEL MONTE, ANDREW DEL MONTE and MICHAEL GURECKAS, Individually and on Behalf of the Class they Represent; JOAN DEL MONTE, KARL SEUTHE, CLYDE MCCOWN and JOHN RIGNEY, Individually and as Tax Payers,

Petitioners and Appellants,

v.

GEORGE DEUKMEJIAN, in his Official Capacity as Governor of THE STATE OF CALIFORNIA; JESSE G. UGALDE, Director of the State Department of Veterans Affairs; STATE DEPARTMENT OF VETERANS AFFAIRS; and THE STATE OF CALIFORNIA,

Respondents and Appellees.

APPEAL from a judgment of the Superior Court of Los Angeles County. Barnett M. Cooperman, Judge. Reversed.

Litt & Stormer and Dan Stormer, Panayata Nanopoulos, Western Law Center for the Handicapped, and Paul Steven Miller for Petitioners and Appellants.

Howell Y. Jackson, Arnulfo Hernandez, Jr. Douglas C. Wills and Charles G. Bates for Respondents and Appellees.

Appellants appeal from the superior court's denial of their petition for peremptory writ of mandate/complaint for declaratory relief which challenged, inter alia, the constitutionality of various provisions of the Military and Veterans Code which condition

eligibility for statutory benefits upon the veterans' California residency status at the time of entry into active military duty.

Bound by the doctrine of stare decisis and U.S. Supreme Court interpretations of the constitutionality of similar benefit programs in *Zobel, Soto-Lopez* and *Hooper,* we find California's plan of preferring established California resident veterans over otherwise bona fide resident veterans of California violative of the equal protection clause of the federal Constitution.

FACTS AND PROCEEDING BELOW

Under California law, veterans residing in the state may qualify for a number of state benefits for themselves and their family members. The California Legislature has conditioned eligibility for most of those benefits on the veteran having been either a native of or a bona fide resident of the State of California at the time he or she entered active military service. Benefits reserved exclusively for "Cal-Vets" include educational benefits for veterans (Mil. & Vet. Code, §§ 981.1, 981.2); farm and home loan assistance (Mil. & Vet. Code, ch. 6, arts. 3, 3.1); and, disaster indemnity for those qualified to participate in the farm and home loan program (Mil. & Vet. Code, ch. 6, art. 3.8.).

Section 980 of the Military & Veterans Code set forth the definition of "veteran" to be applied in determining eligibility for all benefits for in Chapter 6 ("State Benefits for Veterans"). That section provides:

"(a) As used in this chapter, 'veteran' means either of the following:

"(1) Any citizen of the United States who served in the active military, naval, or air service of the United States on or after April 6, 1917, and prior to November 12, 1918; received an honorable discharge or was released from active duty under honorable conditions; *was at the time of entry into active duty, a native of or a bona fide resident of this state* or, if a minor at that time, entered active duty while in this state; and had lived in this state for six months immediately preceding entry into active duty.

"(2) Any person who served in the active military, naval or air service of the United States for a period of not less than 90 consecutive days or was discharged from the service due to a service-connected disability within that 90-day period; received an honorable discharge or was released from active duty under honorable conditions; *was at the time of entry into active duty a native of or bona fide resident of this state* or, if a minor at that time, entered active duty while in this state and had lived in this state for six months immediately preceding entry into active duty; and performed any portion of that service during any of the following periods:

"(A) On or after December 7, 1941, and prior to January 1, 1947.

"(B) On or after June 27, 1950, and prior to February 1, 1955.

"(C) On or after August 5, 1964, and prior to May 8, 1975.

"(D) In time of peace in a campaign or expedition for service in which a medal has been authorized by the government of the United States." (Italics added.)

In a separate section entitled "Veterans' Dependents," chapter 4, article 2 of the Military & Veterans Code provides for educational assistance to dependents of veterans in the form of payment of tuition and fees for high school, college and trade school students. (Mil. & Vet. Code, § 890 et seq.) Dependents of Cal-Vets are also entitled to monthly stipends of $50 for high school students and $100 for college and trade school students while satisfactorily and regularly enrolled in these institutions. (Mil. & Vet. Code, § 894.)

This article contains its own distinct definition of "veteran" for purposes of establishing eligibility. The veteran must have either been killed in action, died or become disabled as a result of war service; or if categorized as a prisoner of war or missing in action, the veteran must have been a resident of California at the time of entry into military service. (Mil. & Vet. Code, § 890(a).)

Although funds have been appropriated annually to implement this section, provisions written into the budget act over the years have not allowed any funds to be expended to provide educational

financial assistance to any dependents of "non-California veterans as defined in section 980 of the Military and Veterans Code." (See, e.g., 1988-1989 Final Budget Summary, Item No. 1960, p. 129.) The practical significance of this restriction is that eligibility for benefits has been limited to dependents of veterans who were California natives or residents *at the time they entered military service.*[1]

Appellant Charles Del Monte is a veteran of the Korean War. He entered into active military service in 1950 from the State of New York. Charles Del Monte became disabled as a result of his military service. In 1962 Charles and Joan Del Monte settled in California.

Their sons, appellants Nicholas and Andrew Del Monte, repeatedly applied for dependents' educational assistance. Nicholas was enrolled at Humboldt State University and Andrew was a high school student. There was no response to Nicholas' first three applications and the fourth was denied on the basis his father was not a Cal-Vet. Inexplicably, Nicholas began receiving benefits retroactively in 1986. In 1987, Andrew began receiving monthly stipends as well despite written notification from the Department of Veteran Affairs the Del Montes were ineligible for benefits due to the fact Charles Del Monte was not a Cal-Vet.

As a result of a subsequent audit of the department to eliminate ineligible recipients of educational assistance, monthly stipends to the Del Monte children were terminated without written explanation and without notification of any rights they may have had to appeal the decision.

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[1] Section 32320 of the Education Code provides for tuition and fee waivers at state colleges and universities for dependents of all veterans, regardless of their residency status, where the veteran has died or become disabled as a result of military service, provided certain financial requirements are met.

Dependents of these veterans are not eligible, however, for tuition and fee waivers at private colleges, universities or trade schools nor are they eligible for monthly stipends -- benefits otherwise provided to Cal-Vet dependents.

Appellant Michael Gureckas entered military service from Connecticut in February 1966 to serve in the Vietnam War. He was a member of the Air Force until April 1968 when he was honorably discharged with a 100 percent service-related disability. Gureckas has resided in California since August 1967 when he was transferred here.

In 1971 Gureckas sought information concerning eligibility for veterans' home purchase assistance. He was informed he was ineligible because he had entered military service from another state.

Appellants Clyde McCown, Karl Seuthe and John Rigney are all army veterans who are residents of the State of California and have paid taxes to the state during the years preceding the initiation of this action.

McCown is a World War II veteran who entered military service from Louisiana and served in the United States Navy from 1943 to 1946. He has been a resident of California since 1946.

Karl Seuthe is a Korean War veteran who entered military service from New York. In 1952 he was transferred to California where he completed his military service and established permanent residence.

John Rigney is a World War II veteran who entered the military service from Georgia. He received an honorable discharge from the service in 1946 and in 1950 permanently moved to California.

On May 6, 1988, petitioners filed their petition for writ of mandate and complaint for declaratory relief. Petitioners also moved for class certification requesting reimbursement of benefits withheld on behalf of class members. Petitioners alleged the fixed point residency requirement for veterans' benefits violated their constitutional rights to equal protection of the laws and to migrate. They further challenged the provision in the Annual Budget Act limiting educational benefits to dependents of veterans who were California natives or residents at the time of entering military service as violative of the single subject rule of

the state constitution. Finally, petitioners contended the lack of procedures for notification and appeal of Department of Veterans' Affairs' decisions to deny benefits for dependents of veterans violates due process.

An amended petition/complaint was filed to which respondents demurred. Respondents also moved to strike certain portions of the complaint and filed their opposition to petitioners' motions for a peremptory writ and class certification. Respondents' demurrer and motion to strike were denied and respondents answered the first amended petition/complaint.

On March 6, 1988, the superior court entered its judgment. The court specifically found appellants had standing, as persons with a substantial interest in the outcome of the suit, to challenge the constitutionality of California's statutory benefit plan for veterans. However, in view of its disposition, the trial court did not rule on appellants' motions for class certification. The court denied the petition for peremptory writ of mandate, declaring item 1960 of the Annual Budget Act and section 980 of the Military and Veterans Code were not constitutional and that item 1960 did not violate the single subject rule of the California Constitution; that respondents did not have a current policy and practice of summarily denying and terminating benefits and that respondents' current appeal procedures did not violate the due process clauses of the United States and California Constitutions; and denying the injunctive relief requested.

DISCUSSION

I.

PRECEDENTS OF THE U.S. SUPREME COURT ESTABLISH THE PRINCIPLE CONDITIONING STATE BENEFITS ON STATE RESIDENCY AS OF A FIXED TIME VIOLATES THE EQUAL PROTECTION CLAUSE.

As the United States Supreme Court has made clear on several occasions, the Fourteenth Amendment to the United States' Constitution prohibits a state from limiting eligibility for benefits

to individuals who were state residents as of a certain date unless there is sufficient justification for the limitation.

In *Zobel* v. *Williams* (1982) 457 U.S. 55, Alaska residents challenged the constitutionality of a state dividend plan which distributed state income to citizens in varying amounts depending upon the length of residency in the state. The Court determined that statute classified Alaskan residents into categories triggering an equal protection analysis. "The dividend statute creates fixed, permanent distinctions between . . . perpetual classes of concededly bona fide residents, based on how long they have lived in the state. . . . When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment." (*Id.* at pp. 59-60)

The state advanced three justifications for its system of classifying residents for receipt of benefits: 1) the creation of a financial incentive for individuals to move to Alaska and establish residency; 2) the encouragement of prudent management of Alaska's mineral surplus fund; and, 3) recognition and reward of residents based upon the contributions they had made during their years of residency. (*Id.* at p. 61.)

The Court found granting greater benefits to longer term residents in no way served the state's purported interests. Increased migration and concern for management of the fund would be better served by granting benefits to all residents in equal amounts. The third asserted state interest in rewarding residents for their past contributions to the state, was held to be an illegitimate purpose. (*Id.* at p. 63.) The Court warned such a system of rewards could open the door to apportionment of all state services and benefits based upon years of residency — a "clearly impermissible" result. (*Id.* at p. 64.)

Chief Justice Burger, writing for seven justices with Justice O'Connor concurring in the judgment, invalidated Alaska's discriminatory benefit plan finding the state had shown no valid interests which were served by the distinction it made between citizens who established residence before the fixed date and those who had become residents since then. (*Id.* at p. 66.)

Three years later the Court in *Hooper* v. *Bernalillo County Assessor* (1985) 472 U.S. 612, decided the constitutionality of a property tax exemption for veterans who were residents of New Mexico before "entering active military service from New Mexico." This statutory distinction based on residency at a fixed point is virtually identical to the statute involved in this case which determines a veteran's residency status as of the fixed date he or she entered military service.

New Mexico allowed a $2,000 property tax exemption for veterans who had resided in the state before May 8, 1975, (later extended to May 8, 1976). A Vietnam veteran who established residency in New Mexico in 1981, and who was denied the exemption, challenged the residency requirement on both equal protection and right to travel grounds.

The Court noted the tax exemption statute created two classes of veterans: 1) those who had lived in the state prior to May 8, 1976, and qualified for the exemption and 2) those who moved to the state after that date and were not entitled to the exemption. The Court struck down the fixed point residency requirement as violative of equal protection. Justice Burger, writing for five of the eight participating justices stated: "When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Generally, a law will survive that scrutiny if the distinction rationally furthers a legitimate state purpose. . . . As in *Zobel*, if the statutory scheme cannot pass even the minimum rationality test, our inquiry ends." (*Id.* at p. 618.)

The state offered two of the same discredited justifications advanced by Alaska in *Zobel:* 1) the encouragement of citizens to settle in New Mexico and 2) the expression of appreciation to "its own citizens for honorable military service" by assisting those veterans who were "dependent on the state during a time of upheaval in their lives." (*Id.* at pp. 618-619.) Based on *Zobel*, the Court ruled a fixed residency requirement cannot rationally further the goal of encouraging migration to the state. The Court noted the provision's likely effect was to in fact discourage veterans from settling in the state because new arrivals were ineligible for the veteran's property tax exemption.

With respect to the second state interest, the *Hooper* court recognized as legitimate the goal of rewarding veterans for their wartime service to the nation. The Court also noted: "The New Mexico statute, however, does not simply distinguish between resident veterans and non-veteran residents; it confers a benefit only on 'established resident veterans, i.e., those who resided in the State before May 8, 1976. Appellee and the State justify this distinction on the basis that those veterans who left their homes in New Mexico to fight in Vietnam, as well as those who settled in the State within the few years after the war ended, deserve to be treated differently from veterans who made New Mexico their home after May 8, 1976. The legislature is said to have decided it owed a special responsibility to these 'established' veterans.

"Appellee and the State's evaluation of this legislative judgment may be questioned on its own terms. Those who serve in the military during wartime inevitably have their lives disrupted; but it is difficult to grasp how New Mexico residents serving in the military suffered more than residents of other States who served, so that the latter would not deserve the benefits a State bestows for national military service. Moreover, the legislature provided this economic boon years after the dislocation occurred. Established state residents, by this time, presumably had become resettled in the community and the modest tax exemption hardly bears directly on the transition to civilian life long after the war's end. Finally, the benefit of the tax exemption continues for the recipient's life. The annual exemption, which will benefit this limited group of resident veterans long after the wartime disruption dissipated, is a continuing bounty for one group of residents rather than simply an attempt to ease the veteran's return to civilian life.

"Even assuming that the State may legitimately grant benefits on the basis of a coincidence between military service and past residence, the New Mexico statute's distinction between resident veterans is not rationally related to the State's asserted legislative goal. The statute is not written to require any connection between the veteran's prior residence and military service. Indeed, the veteran who resided in New Mexico as an infant long ago would immediately qualify for the exemption upon settling in the State

any time in the future regardless of where he resided before, during, or after military service." (*Id.* at pp. 621-622.)

The Court distinguished New Mexico's statute from provisions in other states' laws providing for a one-time cash bonus paid directly to veterans to compensate for the disruption in their lives and to assist in the transition to civilian life.[2] While singling these statutes out, the Court questioned whether any state could constitutionally condition even such limited direct assistance to the veteran based on residency as of a fixed date but reserved that question for another day.

Stripped of its asserted justifications, the statute in *Hooper* suffered from the same constitutional flaw as the statute in *Zobel*: it rewarded its citizens on the basis of past contributions — an illegitimate state purpose. "The State may not favor established residents over new residents based on the view that the State may take care of 'its own' if such is defined by prior residence." (*Id.* at p. 623.)

The facts and circumstances in *Hooper* are virtually indistinguishable from the case at bar. The California statute provides certain benefits only to those veterans who were "at the time of entry into active duty, a native of or a bona fide resident of this state. . . ." (Mil. & Vet. Code, § 980 (a); see also § 890 (a)(4).) Thus, the statute classifies veterans into two groups: 1) veterans who were either California natives or California residents when they entered active military service and thus are entitled to the various educational, disaster relief and loan benefits and 2) veterans who became residents of the state after entering active military service who are not entitled to these benefits.

Because the statute classifies its citizens based on their status on the date they entered active military service, based on *Zobel* and *Hooper*, the California statute must be subjected to equal

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[2] That opinion distinguished those state statutes that provided for one-time cash payments upon separation from the military from the open-ended benefit plan involved in *Hooper*. (See, e.g., Ill. Rev. Stat. (1983) ch. 126 1/2, § 57.52; Ky. Rev. Stat. (1980) § 40.005; and 51 Pa. Cons. Stat. Ann. (1976 and Supp. 1984-1985) §§ 20122, 20123.

protection analysis to determine if the legislation is rationally related to the state's goals.[3]

The justifications offered in respondent's brief in support of the classifications are 1) "to encourage and promote patriotism and service to country; 2) to reward such service; and, 3) to compensate and provide assistance to those who were and are its citizens *at the time* they are called upon to make the sacrifice of military service." This later justification is further refined to mean "to compensate those whose civilian careers and lives are disrupted and interrupted by military service *while* they are working and living in the state, and who choose to return to the state after their military service and begin the difficult task of resuming those interrupted careers and lives, perhaps ill-prepared to begin anew in a society and economy which may have changed dramatically during their absence and which conceivably could have left them far behind." (Italics in original.)

As noted in *Hooper*, the first two justifications are plainly legitimate and have been repeatedly held to justify preferential treatment of veterans over the general population. (*Regan* v. *Taxation with Representation* (1983) 461 U.S. 540; *Personnel Administrator of Mass.* v. *Feeney* (1979) 442 U.S. 256.) But as occurred in *Hooper*, this statute does not merely distinguish between veterans and non-veterans, it distinguishes between veterans who happened to enter the military service from California and those who did not. As the Supreme Court observed in *Hooper*, promoting patriotism and rewarding past military service

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[3] Respondents consider it significant the provision has not been subject to constitutional attack on this basis during the approximately 50 years of its existence. But mere "longevity" does not confer constitutionality. "[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack . . . ." (*Williams* v. *Illinois* (1970) 399 U.S. 235, 239.)

In this instance, it is significant there also are no prior judicial opinions upholding the constitutionality of these classifications under the equal protection clause. Moreover, the Supreme Court jurisprudence highlighting the constitutional infirmity of fixed point residency limitations in the distribution of state benefits is of rather recent vintage.

would be best accomplished by granting benefits to *all* veterans equally. The statute confers these benefits only on established residents for the asserted purpose of rewarding past military contributions. As already pointed out, this rationale was held illegitimate in both *Zobel* and *Hooper*.

The third justification — compensation to those veterans whose lives were disrupted while living in the state to ease the difficult transition period back to civilian life — might have merit if the statute directly furthered this goal. However, the statute suffers from the same deficiency found in the statute in *Hooper*. All veterans throughout the United States have their lives disrupted by military service. It is difficult to understand how California residents could have suffered any more than veterans from any other state. Leaving civilian life, school or jobs is a disruption no matter where is occurs. Moreover, California residents have equal reason to be grateful to those veterans born in Alabama or Wyoming who had their lives disrupted, as they have for being grateful to Californians who suffered to protect our national interests.

Nor do the benefits conferred in the legislation necessarily help ease the veteran's transition to civilian life. There is no provision for an immediate cash pay-out to the veteran upon completion of a tour of duty or separation from the military. The provisions for educational benefits apply not only to the veteran, but to any children he or she may presently have or have in the future. The benefits of a low interest rate on the acquisition of a house or farm is not limited to a short period after termination of military service but is available for 30 years after honorable discharge from the service. Moreover, the benefits are reaped over the life of the mortgage, usually decades.

None of these benefits directly bear on the transition to civilian life immediately after a war's end. The various educational and loan benefits are realized over the life of the veteran and into the next generation. As noted in *Hooper*, this preferential treatment will "benefit this limited group of resident veterans long after the wartime disruption dissipate[s] [and] is a continuing bounty for one group of residents rather than simply an attempt to ease the veteran's return to civilian life." (472 U.S. at p. 621.)

Furthermore, the legislation does not require a direct connection between the veteran's prior residence and military service. The benefits are conferred upon any "native of or bona fide resident" of California who entered military service from California. Thus, any person born in California would presumably immediately qualify for the benefits whether or not he or she actually resided in the state before, during or after the war if he or she entered military service from California.

Under closer inspection, the legislation merely serves to give preferential treatment to its own citizens as defined by when they settled in the state or where they were born — the very rationale found constitutionally lacking in *Hooper* and *Zobel*.[4]

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[4] Respondents attempt to distinguish California's veterans' benefit statutes from other unconstitutional fixed date residency requirement benefit programs by pointing out a veteran may enter into "active duty" and thereby qualify for benefits by re-enlisting in California. (Mil. & Vet. Code, § 987.52.)

This provision does not provide much solace to non-established California veterans of World War I, World War II, the Korean War or the Vietnam War. To obtain these benefits, non-established resident veterans would have had to re-enlist and serve an additional four years immediately after being released from the horrors and perils of war — something an established resident veteran would not have had to suffer — or wait until the next military conflict to attempt to re-enlist then, at age 40, 50, 60 or older.

This latter option, moreover, would seldom if ever exist as a practical matter. It is no doubt the rare exception for any military person to re-enlist after years of separation from the service. The decision to serve another four years with the military is typically made at or near the end of the prior period of service.

Thus any attempt to treat the re-enlistment provision as a saving mechanism is useless for the overwhelming majority of otherwise qualifying veterans. Moreover, the re-enlistment provision does no more to validate the statute than did the one-year extension for eligibility New Mexico drafted into its statute in *Hooper*.

The state further attempts to distinguish California's benefit plan by pointing out *current* and *future* residents are entitled to the preferential treatment if they serve in a future campaign or expedition in which a medal is awarded. (Mil. & Vet. Code, § 980 (a)(2)(D).) This provision

There is no valid rationale to grant this group preferential treatment over other concededly bona fide residents of California who chose to settle in this state after serving their country in a period of war. Their lives were equally disrupted, they served the same country, they have the same needs and difficulty in reacclimating to civilian life. For example, Naval personnel based in Long Beach or Oakland should not be penalized for the decision to remain in a state in which they have developed attachments and commitments while serving in the military.

In sum, California's veteran benefit program is not rationally related to the state's asserted goal of compensation for disruption of a veteran's life by a call to military duty while living in the state. We further find it violative of the equal protection clause of the Fourteenth Amendment on the authority of *Zobel* and *Hooper* alone. The statutes involved in this case and the rationales asserted in support of it are so closely analogous to those involved in the Supreme Court decisions in *Zobel* and *Hooper* as to compel the result in this case.

The U.S. Supreme Court's subsequent decision in *Attorney General of N.Y.* v. *Soto-Lopez* (1986) 476 U.S. 898, lends further support to this conclusion.

II.

THE SOTO-LOPEZ DECISION HELD UNCONSTITUTIONAL A STATE BENEFIT PLAN THAT DISCRIMINATED AGAINST NON-ESTABLISHED RESIDENT VETERANS.

In *Soto-Lopez* the Supreme Court confronted a New York statute similar to California's which gave preferential treatment in civil service employment to veterans who were New York residents at the time they entered military service. *Soto-Lopez* was a plurality decision. Four justices held the provision impaired the

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merely reinforces the requirement one must first be a resident of California to be entitled to benefits after the conflict ends.

Thus, these provisions in no way change or expand the narrow group of established resident veterans singled out for special treatment.

right to travel and thus subjected it to close scrutiny, concluding the classification violated equal protection. Two justices found it unnecessary to apply the heightened scrutiny test becasue they held the provision was not rationally related to the asserted state's goals and was unconstitutional on that basis.

In *Marks* v. *United States* (1977) 430 U.S. 188, 193, the Court explained the proper analysis for interpreting and applying plurality decisions of that court. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .' " (Citing *Gregg* v. *Georgia* (1976) 428 U.S. 153, 169, fn. 15.)

The directive of *Marks* is obvious — the decision in *Soto-Lopez* cannot be dismissed as without precedential value as respondents contend. Six justices in that decision clearly held the New York law giving preferential treatment to veterans who were residents when they entered active military service was unconstitutional.

Justice Brennan, writing for four members of the Court in *Soto-Lopez*, found the state's asserted interests of promoting enlistment, helping returning veterans to establish themselves, inducing veterans to return to New York, and employing a "uniquely valuable class of public servants," were promoted fully by granting bonus points to all otherwise qualified veterans. (*Id.* at p. 909.) Justices Burger and White expressly found the bonus program not even rationally related to the state's asserted goals. All six Justices found a lack of connection between the benefits conferred and the transition period to civilian life. Justice Brennan, relying on the rational basis analysis in *Hooper* stated in the plurality opinion: "the fact that eligibility for bonus points is not limited to the period immediately following a veteran's return from war casts doubt on New York's asserted purpose of easing the transition from wartime military conditions to civilian life, for, presumably a veteran of the Korean War could take a civil service examination and receive the bonus points tomorrow, 30 years after his homecoming. Cf. *Hooper*, 472 U.S. at 621 . . . . The State's failure to limit the credit to enlistees recently returned to New York from war strongly suggests that the State's principal

interest is simply in rewarding its residents for service to their country." (*Id.* at p. 910.)

As pointed out in Section I, *supra*, California's benefit program for veterans suffers from the same constitutional infirmity. It purports to ease the veteran's transition from military to civilian life yet is not limited in time to the period immediately following completion of military service. The benefits are on-going throughout the life of the veteran and his or her spouse and dependents. Veterans who entered military service from California may take advantage of some benefits today even if they served in World War II. But veterans like appellants who have been residents of California for decades, but who did not enter the service from California, are penalized strictly on that basis.

Because the legislation does not further any of the state's asserted goals, it must be seen for what it is — an attempt to treat preferentially its own citizens by preferring only those whose lives were disrupted by a call to military service "while" living in California — a justification consistently found constitutionally inadequate by a majority of the U.S. Supreme Court on even a rational basis standard.

For these reasons we conclude California's veteran benefit preference for only established residents does not rationally relate to the state's asserted purposes and thus violates the equal protection clause of the United States Constitution.[5]

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[5] Because of our disposition of this matter, and the impact our decision will have on further discrimination in the distribution of educational assistance to the dependents of veterans, we need not reach the question of whether item 1960 of the Budget Act violates the single subject rule of the California Constitution. Nor do we reach the issue whether the exclusion from benefits of veterans resident in other states at the time they entered service impairs the constitutional right to travel thus requiring this legislative classification to be subjected to close scrutiny under the equal protection clause. (*Attorney General of N.Y.* v. *Soto-Lopez*, *supra*, 476 U.S. 898 [plur. op.]; see also *Shapiro* v. *Thompson* (1969) 394 U.S. 618.)

III.

THE RECORD IS VOID OF ANY EVIDENCE THE DEPARTMENT OF VETERANS' AFFAIRS HAS PROCEDURES IN PLACE THAT SATISFY DUE PROCESS REQUIREMENTS FOR THE DENIAL OR CANCELLATION OF BENEFITS FOR DEPENDENTS OF VETERANS AND FOR APPEALS OF THOSE DECISIONS.

Individuals receiving state statutory benefits enjoy protected property interests within the meaning of the due process clause. (*Goldberg* v. *Kelly* (1970) 397 U.S. 254) "[I]n every case involving a deprivation of property within the purview of the Due Process Clause, the Constitution requires some form of notice and a hearing." (*Beaudreau* v. *Superior Court* (1975) 14 Cal.3d 448, 458, citing *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.* (1975) 419 U.S. 601; *Goss* v. *Lopez* (1975) 419 U.S. 565.)

The factors to weigh to determine the extent and nature of process due under the federal Constitution are: 1) the nature of the private interest involved; 2) the risk of erroneous deprivation of that interest through the procedures used and the value of any additional procedural safeguards; and 3) the government interest in maximizing administrative efficiency. (*Mathews* v. *Eldridge* (1976) 424 U.S. 333, 334-335; accord, *McCullough* v. *Terzian* (1970) 2 Cal.3d 647.)

In this case educational benefits for Nicholas and Andrew Del Monte were initially denied and later withdrawn without opportunity to challenge those decisions. Except for the unconstitutional fixed point residency requirement for their veteran father, Nicholas and Andrew Del Monte otherwise met every other criteria for eligibility under the statutes. Their father was a disabled veteran of the Korean War and they were regularly and satisfactorily enrolled in school.

Loss of educational benefits may not be as significant as the loss of welfare benefits (*Goldberg*), but they are extremely valuable to those dependents for whom public assistance may constitute the only opportunity to better themselves and ultimately secure meaningful employment. Because eligibility for

dependents' education assistance benefits is contingent upon a low family income, most recipients will fall into this category.

On August 25, 1988, the trial court ordered respondents to file supplemental evidence "of all public information supplied by the Department of Veterans Affairs to members of the public requesting information with respect to veterans' rights under the law." The purpose of this order was to determine if the denial of due process rights to the Del Montes was merely an aberrational oversight by the department. Respondents submitted the declaration of Howell Jackson, chief attorney for the Department of Veterans' Affairs. This declaration and the exhibits attached to it demonstrated sufficient procedural safeguards were in place to protect against erroneous denials of benefits to *veterans* themselves.

Decisions denying benefits were relayed to the veteran by letter in which the veteran was informed of his appeal rights. Brochures distributed to veterans explaining their benefit rights contained explanations on how to file a complaint and appeal an adverse decision. Thus it appears the department was in literal compliance with section 86 of the Military & Veterans Code as regards due process for veterans themselves. That section provides that "Any person *deeming himself a veteran* and who applies for benefits may appeal any decision made by a division of the department to the California Veterans Board. Upon receipt of such an appeal, the board shall grant a hearing, if requested, and shall render its decisions in writing to the appellant . . . ." (Italics added.)

However, no evidence was offered of similar safeguards for applicants of benefits by dependents of veterans despite ample opportunity to do so. Indeed, the brochure distributed by the Department of Veterans Affairs explaining educational assistance benefits for dependents offers no information on how to challenge an adverse decision.

If the Del Montes' experience is typical, it appears the department does not include as a practice or procedure written notification of the denial or cancellation of benefits for veterans' dependents. Although the Del Montes specifically requested a written explanation for the cancellation of benefits they were told

none would be forthcoming. They were also not informed of any available process by which they could appeal the adverse decision.

It would make no sense for the notice and hearing procedures of Military & Veterans Code section 86 to apply exclusively to appeals by the veteran himself or herself when so many of the statutory benefits apply to spouses or dependents of veterans who are either dead or missing in action and unavailable to personally assert a claim for the wrongful denial of benefits. Thus, reserving due process for veterans only could not have been the intent of the Legislature in enacting Military & Veterans Code section 86. That section should be construed to require notice and an opportunity to be heard by any otherwise eligible recipient of benefits granted to veterans which would obviously include dependents of veterans eligible for educational financial assistance.

In sum, procedural safeguards presently afforded to veterans should also be extended to other qualified recipients or applicants for statutory benefits who have been denied benefits provided under the Military & Veterans Code.

DISPOSITION

The judgment is reversed and the cause remanded to the superior court with instructions to issue the peremptory writ of mandate and for proceedings consistent with this opinion. Appellants to recover their costs on appeal.

CERTIFIED FOR PUBLICATION

_____

JOHNSON, J.

We concur:

_____

LILLIE, P.J.

_____

WOODS (Fred), J.

Appendix C

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Case No. CA 001096

[Filed Mar. 6, 1989]

Superior Court of California

County of Los Angeles

CHARLES DEL MONTE, NICHOLAS DEL MONTE,
ANDREW DEL MONTE, and MICHAEL GURECKAS,
Individually and on behalf of the class they represent,
JOAN DEL MONTE, KARL SEUTHE, CLYDE MCCOWN
and JOHN RIGNEY,
Individually and as Tax Payers,
Petitioners/Plaintiffs,

VS.

GEORGE DEUKMEJIAN, in his Official Capacity as Governor of THE STATE OF CALIFORNIA, JESSE G. UGALDE, Director of the State Department of Veterans Affairs, STATE DEPARTMENT OF VETERANS AFFAIRS; and THE STATE OF CALIFORNIA,
Respondents/Defendants.

JUDGMENT

The above-entitled proceeding came on regularly for hearing over a period of several separate days before the Court sitting without a jury, a jury trial having been expressly waived. Affidavits were received and considered, and the matter was argued, briefed, and submitted. The Court announced its tentative decision on December 7, 1988, by an oral statement made in open

court in the presence of all parties who appeared. The Court having later prepared and mailed its proposed Statement of Decision, and no objections thereto having been filed and served, and the time for filing objections having expired, and good cause appearing therefor.

IT IS HEREBY ORDERED AND ADJUDGED that:

1. The petition for a peremptory writ of mandate is denied.

2. The respective rights and duties of the parties are declared as follows:

(a) Item 1960 of the Annual Budget Act and Section 980 of the Military and Veterans Code, insofar as they limit eligibility for veterans. benefits to persons who were residents of California at the time of entry into active duty, are not unconstitutional under the United States Constitution;

(b) Item 1960 of the Annual Budget Act does not violate the single subject rule of the California Constitution; and

(c) Respondent/Defendant Department of Veterans Affairs does not have a current policy and practice of summarily denying and terminating benefits, and its current appeal procedures do not violate the due process clauses of the United States Constitution and California Constitution.

3. The requests for preliminary and permanent injunctions are denied.

Dated: March 6, 1989.

BARNET M. COOPERMAN
Judge of the Superior Court

Appendix D

Superior Court of the State of California
for the County of Los Angeles

Department No. 59 Hon. Barnet M. Cooperman, Judge

[Filed Jan. 1989]

CHARLES DEL MONTE, etc., et al.,
Plaintiffs,

vs.

GEORGE DEUKMEJIAN, etc., et al.,
Defendants.

Reporter'S Transcript of Proceedings
(Statement of Intended Decision)
Wednesday, December 7, 1988

APPEARANCES:

For the Plaintiffs:

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— and —
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ANTOINETTE J. AQUARO, CSR #2777
Official Reporter

LOS ANGELES, CALIFORNIA; WEDNESDAY, DECEMBER 7, 1988; 1:20 P.M.

THE COURT: Good afternoon. Counsel, please give appearances for the reporter.

MS. GRAYSON: Pegine Grayson of Litt & Stormer for the petitioner.

MR. STORMER: Dan Stormer of Litt & Stormer for petitioner and plaintiffs.

MR. JACKSON: Howell Jackson for the defendant.

THE COURT: Do counsel have anything further to address to the Court?

MR. STORMER: The plaintiffs do not.

MR. JACKSON: No, your Honor.

THE COURT: There was a demand for a jury trial, Mr. Stormer.

MR. STORMER: I don't believe that this case is one which would allow for a jury trial, and we would withdraw it.

THE COURT: Very well. The record will so reflect.

The Court at this time intends to give its statement of intended decision.

Plaintiffs seek a Declaration of Rights by the Court and a Writ of Mandate and Injunction ordering that the Cal Vet Program, providing for home and farm purchases and educational benefits and dependent education benefits for California veterans is in violation of the Federal Constitution, and particularly the equal protection clause and the privilege and immunity clause, which clauses have been said to embrace the right to travel.

Plaintiffs have attacked the Cal-Vet Program so far as it purports to benefit only those veterans of World War I and II, the Korean War and the Vietnam War who, at the time of entry into service, were natives of or a bonafide resident of the State of California, as referred to in Section 980 of the Military and

Veterans Code. This is a so-called fixed point of residency requirement.

I wish to say in passing that California has many veteran benefits that do not turn on a fixed point of residency. The plaintiffs attack those portions of Division 4, Chapters 4 and 6 of the Military and Veterans Code providing for educational benefits for veterans and their dependents, and providing for farm and home purchase. And they also attack the current budget act limiting such benefits to California veterans, as defined in Section 980 of the Military and Veterans Code, which as I said is the fixed point of residence requirement.

Now the main basis for plaintiffs' attack is provided by a Federal Supreme Court case known as the *Attorney General of the State of New York versus Soto-Lopez.*

This is a 1986 case cited and reported in *476 U.S. 898, 90 Lawyers Edition 2nd 899, 106 U.S. Supreme Court 2317.*

In that case the Supreme Court struck down in a plurality — that is, a non-majority opinion — a State of New York statute which gave civil service examination preference points to veterans who, at the time of entry into service, were residents of the State of New York.

The plaintiffs in Soto-Lopez were residents of the State of New York at the time of the examination, but they were veterans who had entered service from Puerto Rico and not from the State of New York.

The plaintiffs in Soto-Lopez contended that such an examination preference law deprived them of their constitutional right to travel freely.

Under a strict scrutiny test, a plurality of four Justices agreed with plaintiffs, reversing the trial Court and affirming the decision of the Second Circuit Court of Appeal.

The plurality opinion was written by Justice Brennan, who was joined by Justices Marshall, Blackmun and Powell.

Two Justices, Chief Justice Burger and Justice White concurred in striking down the New York statute on the ground that it did not pass a minimum rationality test.

Three Justices, Justices O'Connor, Rehnquist and Stevens dissented on the ground that, one, the prior residence requirement there at bench did not violate equal protection or the non-specific right to migrate or travel because of the limited impact of the prior residence requirement; and, two, the requirement of prior residence for the veterans preference was rationally related to the legitimate State purpose of serving as an expression of gratitude to veterans who entered military service as New York residents.

The plurality held, after finding that the New York law actually deterred travel and served to penalize the exercise of that right, that veterans who became residents after service were as much the State's own as veterans who entered service from the State of New York, and that the statute in effect created two classes of veteran citizens.

The plurality also held that the State of New York, in the face of the statute's deterrence of travel, had failed to show a compelling state interest justifying such interference with the right to freely migrate or travel.

Now, in this case the defendent, Department of Veterans Affairs of the State of California, argue in the first instance that plaintiffs who seek California veterans home benefits, home purchase benefits and dependent education benefits, notwithstanding their having gone into service from other states, and noncompliance with veterans status as defined in the Military and Veterans Code Section 980, the defendant contends that these plaintiffs do not have standing to sue on at least two grounds.

Number one, Mr. Jackson argues that the plaintiffs are in violation of the statute of limitations; that they have not brought their action soon enough, that they're late, referring to Code of Civil Procedure Section 338, three-year period of limitation for a right under a statute; and C.C.P. Section 343, which provides four years within which to bring an action in cases not otherwise provided for.

The second point raised by Mr. Jackson in connection with this argument, plaintiffs do not have standing to sue, is that the plaintiffs have not shown that they satisfied the legal requirements of the Cal Vet Program such that they would be entitled to benefits, but for their residence at the time of entry into service. He says that is a necessary pre-condition to a standing to sue.

Now, the Court finds no violation of the statute of limitations in that Military and Veterans Code Section 987.57, which became law on July 13th of this year, provides for filing for Cal Vet benefits, and it includes — it adds members of the Merchant Marine to such beneficiaries, that they must make a claim for benefits within 30 years from the date of discharge or release from active duty or prior to January 1, 1993, whichever is later.

I do not know whether either counsel are aware of that statute. It was passed relatively recently.

The Court further holds that plaintiffs have standing to challenge the constitutionality of fixed point of residence requirement of the California Veterans Program as persons having a substantial interest in the outcome of litigation pertaining to the vaiidity of that program, even though proof of compliance with other portions of the law would be necessary as a pre-condition of the right to claim Cal Vet benefits in the event of their prevailing.

The Court approaches this case recognizing the obligation that this Nation and State, all states, owe to veterans who have sacrificed so much for the protection of their nation and those who remain at home. And the Court also recognizes that a service person serves the Nation, all of the states, and not just the state that the service person hails from at the time of entry into service.

In looking at the Cal Vet Program, this Court is required by the Federal Supreme Court to examine it carefully to see if it creates two classes of veterans; those who went into the service from California as residents of the State at the time they entered, and other veterans who went into the service from some other state. And it also has to carefully examine the program to see if it indeed penalizes the free right to migrate or travel, such that a veteran might be caused to choose to stay elsewhere rather than travel to California.

The Court begins it analysis by noting that the Supreme Court in *Soto-Lopez* and in the earlier case of *Hooper versus Bernalillo, 1985 472 U.S. 612 86 Law Edition, 2nd 487 105 Supreme Court 2862* did not strike down all fixed point of residence laws.

This Court finds that the Cal Vet home and farm purchase program and dependents education program does not fall within the parameters of *Soto-Lopez* under the reasoning of the six Justices who struck down the New York statute there at bench.

The Court so finds in that the Cal Vet law must be looked at in its context.

The Cal Vet home and education programs, as the Court has studied those programs in the Military and Veterans Code, are supplementary to the Federal program for veterans known as the G.I. Bill of Rights, or more technically, the Soldiers and Sailors Civil Relief Act, and the follow-on Federal programs for veterans of subsequent military conflicts.

With the generous benefits veterans have had, and to which they're certainly entitled, for home purchase and educational benefits, under Federal law, a veteran had and has a maximum freedom of movement to establish himself or herself in whatever state they were disposed to settle in. And, although, as the plaintiffs point out, the defendant, Department of Veterans Affairs, has not shown specifically how many veterans have come to the State of California and have utilized their Federal benefits, it is fair to say that the State of California became the goal of thousands and probably hundreds of thousands of veterans who were able to come and freely travel to this State by reason of those Federal benefits.

There are no figures and facts that are directly given to the Court, but the Court believes that it may take judicial notice of the number of veterans who have come to this State under benefits provided by the G.I. Bill of Rights who have studied here, gone to our educational institutions, who have bought businesses here, who have bought homes here, and have prospered here, as the Federal law contemplated.

The Court is not basing its holding on that matter, but believes that it is appropriate to state these facts.

The supplementary status of the Cal Vet home purchase program and benefits relating thereto shows in that a veteran — and I'm talking about a California veteran as defined in Section 980 of the Military and Veterans Code, is not eligible for such a benefit unless he or she has not owned a home for three years or is buying a home in a designated target area. This is provided in 26 United States Code Section 143, Subdivision D.

Ownership of a home purchased under the Federal G.I. Bill would constitute a disqualification for even a California veteran.

Similarly, a dependent of a California veteran, as defined in Section 980 of the Military and Veterans Code — this is a California veteran — is not eligible for stipends or waivers of fees from State schools, if such dependents are receiving educational benefits under any Federal program.

Again, showing the supplementary nature of the California program.

In this connection, see Military and Veterans Code 896.1 and 896.4.

Such California legislation shows that the Cal Vet Program is secondary, limited and narrower in benefit, vis-a-vis the primary Federal programs.

With the federal primary veterans program in effect, this Court does not believe that it can be said that a veteran wishing to leave his or her home and come to California from some other state would reasonably suffer a penalty or deterrence to travel, because the State of California had a limited supplementary education and home purchase program for retired service persons who entered the service as California residents.

Further, the Court finds that it cannot be said that the California Veteran Program at bench creates two classes of veterans;

those who enter from California, and those who entered from other states. This is so for the following reasons:

Number one, California does have programs not limited to Section 980, veterans and their dependents.

I said earlier that many programs — and this State has more programs for veterans than most other states — many of those are not limited to Cal vets, those who entered the service from California.

For example, non-California veterans' dependents who otherwise qualify with respect to income limitation are entitled to tuition waivers from California schools. And this is for dependents of persons who are not California veterans.

Another important benefit given to persons who were not residents of the State of California at the time of entry into service is set forth in Military and Veterans Code Section 980.1. This is veterans' benefits under California veterans law for certain persons of Japanese ancestry who, during World War II, while a bonafide resident of California, was evacuated from California pursuant to Presidential Executive Order 9066, dated February 19, 1942, and who entered the armed forces from a state other than California, regardless of whether or not such a person has received a bonus compensation or benefit from such other states on the basis of his service in the armed forces.

In addition, a career service person who originally entered into active duty from another state may subsequently establish residence in California, re-enter service, or re-enlist, and qualify for Cal Vet benefits.

In this connection, see Military and Veterans Code 987.52.

Further, under Military and Veterans Code Section 986, even for Cal vets, persons who entered from California, the law gives to the Department of Veterans Affairs the right to prefer certain Cal vets. If not all Cal vets can be given California benefits, the Department has the prerogative to give certain California veterans preference, namely those who were wounded or disabled, benefits for unremarried spouses of veterans who have been killed in action or missing in action, and may also prefer California

veterans who are discharged and who are seeking the benefits within ten years, giving benefit to those who are more in need, less established, than veterans who have been discharged for a longer period of time.

These examples show how narrowly and discretely written California veterans legislation is. All of which defuses the contention that the law creates a second class of veterans, namely those who did not enter from the State of California.

Now, the plaintiffs have also indicated that the Cal Vet Program has denied to them procedural due process in that the program does not provide for advising persons who seek Cal Vet benefits of the action that has been taken by the Department of Veterans Affairs so that the person seeking those benefits — and particularly this is with respect to the Del Monte family, that they did not know, had no notice of where they stood, and that, of course, is very regrettable, and I'm sure that the Department of Veterans Affairs would so agree.

But the evidence that the Court has before it indicates that generally there is a compliance by the Department with Section 86 of the Military and Veterans Code which provides for a procedure whereby veterans who seek benefits are informed of the results of the application for benefits and of the right to appeal. And there is in place a procedure whereby the initial finding by the Department's representatives is reviewed.

So that based upon Code Section 86, plus the additional evidence that has bee supplied to the Court with respect to the working of that provision, it appears to the Court that there is no reason for this Court to take action with respect to procedural due process problems as shown by the problem that the Del Monte family faced. That would appear to be not a general problem. At least the plaintiffs have provided no such evidence to the court to indicate that it is a problem that goes beyond the Del Monte family.

The Court also finds no violation of the one subject rule by reason of the Budget Act that is passed each year limiting the operation of Section 890 of the Military and Veterans Code to veterans as defined in Section 980 of that Code.

This Court holds, for the reasons given, that the California Home Purchase and Educational Benefit provisions of the California Veterans Law do not violate the equal protection or privileges and immunities clauses of the Federal Constitution or interfere with, deter, or penalize plaintiffs' right to travel; and accordingly, denies plaintiffs' petition and the remedies sought therein.

It is for the Legislature or the people to alter the benefits provided by law for non-California veterans in the light of the additional financial burdens which would necessarily be undertaken by such extension.

That completes the Court's statement of intended decision.

I know that Mr. Stormer has to get back to the Federal Court. The Court has made an arrangement with Judge Ideman there for his being here. I know that you're due for trial there.

Are there any questions that either counsel may have?

MR. STORMER: Unfortunately, I do have one question, your Honor.

THE COURT: Yes, Mr. Stormer.

MR. STORMER: As to the Del Montes and the due process there was no offer made by the Government as to any due process that applied to Section 890 to the dependents' benefits. There's no manual. There's no procedure. There's nothing that applies to that.

As to Section 980, there was in fact proof, we allege, it was sufficient.

I would just like to bring that to the Court's attention.

THE COURT: Do you have any comment, Mr. Jackson?

MR. JACKSON: The only comment I would make, your Honor, would be that I think in the affidavit that I filed to which I attached as examples copies of, I believe, four decisions which had been rendered, those decision all happened to be Cal Vet decisions.

However, my affidavit also included statistical data on the numbers of appeals which had been filed; and our position is that the Del Monte situation was an isolated case, as I believe the Court found.

THE COURT: Well, Section 86 certainly applies to educational benefits, so that the Department would be governed by that section with respect to any benefit provided for under the Military and Veterans Code.

Now, the Court has indicated that the evidence offered by plaintiffs was limited, and the Court does not believe that on the basis of the one instance that the Court would be warranted in giving the relief sought by plaintiffs.

The Court indicated the reason therefor and adheres to that rationale.

MR. STORMER: I understand, your honor.

One thing that would — I understand your ruling in the entire case. The Del Montes, once again, we're prepared to submit an affidavit in some sort of manner to deal with this problem, have once again sought a fee waiver, as your Honor discussed that program already. And we just learned that they have, for the past five months, refused to rule on it, and refused to give them reasons. We just learned this yesterday, and were told that they were not going to get reasons, certainly written reasons, and certainly there has been no ruling on it.

THE COURT: Well, the Court does not have that before it, Mr. Stormer.

The Statement of intended decision will become the statement of decision in this matter, unless there are procedures taken as set forth in the California Rules of Court.

The Court intends to order the Statement of Intende Decision to be transcribed. The Court will sign it, and as so signed, the Notice or Statement of Intended Decision will become the Statement of Decision in the absence of counsel's taking any other action as connoted by the Code of Civil Procedure or the California Rules of Court.

MR. JACKSON: Thank you, your Honor.

MR. STORMER: One procedural question, your Honor.

Will the Statement of Intended Decision become — will it become effective when it's transcribed or at this point?

I'm just looking for time lines.

THE COURT: It becomes effective pursuant to the time lines set forth in the Rules of Court. If you will consult Section 323 of the Rules of Court, you will have the time lines.

MR. STORMER: Thank your.

THE COURT: I thank both counsel for the very extensive briefing they provided the Court. And when I say both counsel, I mean to include co-counsel as well, because I know you all worked on it, and the matter is of importance, and the assistance of counsel was very helpful to the Court in coming to its conclusion.

We'll stand in recess.

(AT 2:03 p.m. the proceedings were adjourned.)

* * *

January 25, 1989

BARNET M. COOPERMAN

BARNET M. COOPERMAN, JUDGE
Superior Court

No. CA 001096

Superior Court of the State of California
for the County of Los Angeles

Department No. 59 Hon. Barnet M. Cooperman, Judge

CHARLES DEL MONTE, etc., et al.,
Plaintiffs.

vs.

GEORGE DEUKMEJIAN, etc., et al.,
Defendants.

Reporter's Certificate

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.:

I, ANTOINETTE J. AQUARO, Official Reporter of the Superior Court of the State of California, for the County of Los Angeles, do hereby certify that the foregoing pages, 1 through 15, comprise a full, true, and correct transcript of the proceedings taken in the matter of the above-entitled cause on Wednesday, December 7, 1988.

Dated this 23rd day of January, 1989.

ANTOINETTE J. AQUARO
Official Reporter

Court, U.S.
FILED
OCT 19 1992
OFFICE OF THE CLERK

No. 91-1885

In The
Supreme Court of the United States
October Term, 1992

PETE WILSON, in his official capacity as Governor of the State of California, BENJAMIN T. HACKER, as Director of the State Department of Veterans Affairs; STATE DEPARTMENT OF VETERANS AFFAIRS; and THE STATE OF CALIFORNIA
Petitioners,

vs.

CHARLES DEL MONTE, NICHOLAS DEL MONTE, ANDREW DEL MONTE, and MICHAEL GURECKAS, Individually and on Behalf of the Class They Represent; JOAN DEL MONTE, KARL SEUTHE, CLYDE McCOWN, and JOHN RIGNEY, Individually and as Tax Payers,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

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QUESTIONS PRESENTED FOR REVIEW

1. DOES THE CALIFORNIA STATUTORY REQUIREMENT OF STATE RESIDENCE AT BIRTH OR AT TIME OF ENTRY INTO MILITARY SERVICE AS A CONDITION OF ELIGIBILITY FOR CERTAIN VETERANS' BENEFITS VIOLATE THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT?

PARTIES TO THE PROCEEDING

The names of all parties to the proceeding appear in the caption of the case.

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No. 91-1885

In The

Supreme Court of the United States

October Term, 1992

PETE WILSON, in his official capacity as Governor of the State of California, BENJAMIN T. HACKER, as Director of the State Department of Veterans Affairs; STATE DEPARTMENT OF VETERANS AFFAIRS; and THE STATE OF CALIFORNIA

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CHARLES DEL MONTE, NICHOLAS DEL MONTE, ANDREW DEL MONTE, and MICHAEL GURECKAS, Individually and on Behalf of the Class They Represent; JOAN DEL MONTE, KARL SEUTHE, CLYDE McCOWN, and JOHN RIGNEY, Individually and as Tax Payers,

Respondents.

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Respondents Charles Del Monte, et al., respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the California Supreme Court's opinion in this case.

The Opinion of the California Supreme Court is set forth in the Petitioners' Appendix at pp. A1-A19.

STATUTES INVOLVED

Military and Veterans Code

§890. Definitions

As used in this article:

(a) "Veterans" means (1) any person who served in the Army, Navy, or Marine Corps of the United States and was killed in action or died as a result of war service in the World War since April 6, 1917; (2) any member of the Army, Navy, Coast Guard or Marine Corps of the United States, or any of their auxiliaries who was killed in action in World War II on or after December 7, 1941, and prior to January 1, 1947, or who died at any time as a result of way service during such period; (3)

any member of the armed forces of the United States who was killed in action during any period of hostilities in which the United States is engaged, or who died or was totally disabled at any time as a result of active service during any such period or during the induction period; or (4) any person who, at the time of entry into the armed forces of the United States was a resident of this state and was subsequently declared by the United States government to be missing in action, captured in the line of duty by hostile forces, or forcibly detained or interned in the line of duty by a foreign government or power.

(b) "Defendant of a veteran" means the natural or adopted child of a veteran, or stepchild of a veteran as defined by the U.S. Veterans Administration for compensation purposes, the unmarried

widow of a veteran, or the wife of a totally disabled veteran.

(c) "Induction period" means (1) the period beginning September 16, 1940, and ending December 6, 1941, and the period beginning January 1, 1947, and ending June 26, 1950, and (2) the period beginning on February 1, 1955, and ending on the date before the first day thereafter on which individuals (other than individuals liable for induction by reason of a prior deferment) are no longer liable for induction for training and service into the armed forces under the Universal Military Training and Service Act.

Military and Veterans Code

§980. "Veteran" defined; Person not included

(a) As used in this chapter, "veteran"

means any of the following:

(1) Any citizen of the United States who served in the active military, naval or air service of the United States on or after April 6, 1917, and prior to November 12, 1918; received an honorable discharge or was released from active duty under honorable conditions; was, at the time of entry into active duty, a native or a bona fide resident of this state or, if a minor at that time, entered active duty while in this state; and had lived in this state for six months immediately preceding entry into active duty.

(2) Any person who served in the active military, naval, or air service of the United States for a period of not less than 90 consecutive days or was discharged from the service due to a service-connected disability within that

90-day period; received an honorable discharge or was released from active duty under honorable conditions; was at the time of entry into active duty a native or bona fide resident of this state or, if a minor at that time, entered active duty while in this state and had lived in this state for six months immediately preceding entry into active duty; and performed any portion of that service during any of the following periods:

(A) On or after December 7, 1941, and prior to January 1, 1947.

(B) On or after June 27, 1950, and prior to February 1, 1955.

(C) On or after August 5, 1964, and prior to May 8, 1975.

(D) On or after August 2, 1990, to and including the date on which the territories in an around the Arabian

Peninsula cease to be designed as a place where the armed forces of the United States are engaged in combat, as described in Executive Order 12744 of the President of the United States. It is the intent of the Legislature, in enacting this subparagraph, that the benefits provided by this chapter shall be available to all veterans who were on active duty in the armed forces of the United States or who were called to active duty in the reserves or National Guard during the pendency of the deployment of forces for Operation Desert Shield or Desert Storm, which resulted in Executive Order 12744, irrespective of whether these veterans serves overseas or in the United States.

(E) At any time, in a campaign or expedition for service in which a medal has been authorized by the government of

the United States, regardless of the number of days on active duty.

(3) Any member of the services or National Guard who is called to, and released from, active duty, regardless of the number of days served; called during any period when a presidential executive order specifies the United States is engaged in combat; received an honorable discharge or was released from active duty under honorable conditions; was at the time of entry into active duty a native of, or bona fide resident of this state or, if a minor at that time, entered active duty while in this state and had lived in this state for six months immediately preceding entry into active duty.

(b) This chapter does not include any of the following:

(1) A person who was separated from the

armed forces under other than honorable conditions.

(2) A person who was separated from the armed forces on account of alienage.

(3) A person who performed no military duty whatever or refused to wear the uniform.

(4) A person who has received from another state a bonus, compensation, or benefit, the prerequisite of which is service in the armed forces, which service is the basis for the claim of benefits under this chapter.

(5) A person who served only in an auxiliary or reserved component of the armed forces whose service therein did not provide an exemption from the operation of the Selective Training and Service Act of 1940 (54 Stat. 885, as amended).

(6) A person whose service with the armed

forces was due to temporary active duty orders for the sole purpose of training duty, processing, or a physical examination.

(7) A person whose only service during a qualifying period was as a student at a military academy and who, for any reason, failed to complete the course of study and subsequently did not serve on active duty.

STATEMENT OF THE CASE

The statutes at issue mandate that no veteran may get certain benefits (called Cal-Vet Benefits) unless he or she was "a native of California" or "a bona fide resident of California at the time of entry into active military service." The term "native" has gone undefined but can reasonably be construed

as merely having been born in the state of California with no other substantial contacts thereafter.

The Petitioners' summary of material facts accurately sets forth the facts of this case; however, it fails to mention that in the courts below, Petitioners repeatedly argued that while a veteran may not be eligible for benefits, if the veteran rejoins the service from California he or she could then qualify for these benefits. This argument is of little avail to the two Plaintiffs in this action who became disabled as a result of their military service.

Plaintiff Charles Del Monte became disabled as a result of his service in the Korean conflict. Plaintiff Michael Gureckas became a paraplegic as a result of his fighter pilot service in Viet Nam. It is highly unlikely that either Mr. Del

Monte or Mr. Gureckas will be able to return to service. Further, since Plaintiffs Carl Seuthe, Clyde McCown and John Rigney served in World War II, it is equally unlikely that they would be accepted should they reapply for military service.

PROCEDURAL HISTORY

The procedural history as set forth by the Petitioners is essentially correct.

REASONS FOR DISALLOWANCE OF THE WRIT

The Petitioners maintain that this is a case wherein "a state court ... has decided an important question of federal law which has not been, but should be, settled by this Court." Petition for

Writ of Certiorari, p.9. Under this, or any other standard, the Petition must fail. This Court has ruled repeatedly that virtually the identical statutes in question are unconstitutional as a denial of equal protection. Zobel v. Williams, 457 U.S. 55, 102 S.Ct. 2309 (1982); Hooper v. Bernalillo County Assessor, 472 U.S. 612, 105 S.Ct. 2862 (1985); Williams v. Vermont, 472 U.S. 14, 105 S.Ct. 2465 (1985); and Attorney General of New York v. Soto Lopez, 476 U.S. 898, 106 S.Ct. 2317 (1986).

The gist of Petitioners' argument is that the above cases should be overturned. Petitioners are quite openly hoping that the recent changes on this Court might result in overturning precedent which has been unchanged and consistent since their determination.

ARGUMENT

The question of the constitutionality of state veterans' "residence at time of entry" requirements has been settled definitively by this Court.

I. THE UNITED STATES SUPREME COURT HAS CONSISTENTLY RULED THAT CONDITIONING STATE BENEFITS ON STATE RESIDENCY AS OF A FIXED TIME VIOLATES THE EQUAL PROTECTION CLAUSE. THE RESTRICTIONS AT ISSUE ARE UNCONSTITUTIONAL.

The Fourteenth Amendment of the United States Constitution prohibits a state from limiting eligibility for benefits to individuals who were state residents as of a certain date. Any doubt as to the constitutionality of such provisions has been unequivocally resolved by a series of Supreme Court cases.

In Zobel v. Williams, 457 U.S. 55, 102 S.Ct. 2309 (1982) Alaska residents challenged the constitutionality of a certain state dividend distribution plan, which distributed state income in varying amounts to citizens, based upon their length of residency in the state. Under the plan, each citizen eighteen years of age or older would receive one dividend unit for each year of residency since 1959, the first year of statehood. Plaintiffs, state residents of the state since 1978, claimed that the plan violated their rights to Equal Protection and to travel to Alaska, to establish residency, and to enjoy the same rights as other state residents.

At the outset, the Court determined that the statute indeed classified Alaskan residents into separate categories, thereby triggering an equal

protection analysis.

In analyzing the plaintiffs' equal protection claims, this Court declined to decide which standard of review should be applied. Instead, it determined that, even under the more lenient minimum rationality standard, the distribution plan violated the Equal Protection Clause. Id. at 59-61.

Alaska advanced three justifications for its system of classifying residents for receipt of benefits: 1) the creation of a financial incentive for individuals to move to Alaska and establish residency; 2) the encouragement of prudent management of Alaska's mineral surplus fund; and 3) the recognition and rewarding of residents based upon the contributions they have made during their years of residency. Id. at 61. The Court quickly dismissed the first two

justifications as insufficient; both could be served equally well by distributing benefits to all residents in equal amounts. Id. at 62-63. The third state interest failed as an illegitimate purpose. Citing Shapiro v. Thompson, 394 U.S. 618, 632-633, 89 S.Ct. 1322, 1330, (1969) the Court warned that such a system of rewards could open the door to the apportionment of all state services and benefits based upon years of residency, a clearly impermissible result. Id. at 64. Thus, Alaska advanced "no valid state interests which are rationally served by the distinction" it made between its citizens. Id. at 65.

Hooper v. Bernalillo County Assessor, 472 U.S. 612, 105 S.Ct. 2862 (1985), decided three years after Zobel, involved a veterans' property tax exemption. New Mexico allowed a $2000

exemption for veterans who had resided in the state since before May 8, 1975, as well as other benefits. Plaintiff, a Vietnam veteran who established residency in New Mexico in 1981 and who was denied the exemption, challenged the residency requirement on both equal protection and right-to-migrate grounds.

As in Zobel, the Court noted that New Mexico's tax exemption statute created two classes of people: (1) resident veterans who lived in the state before May 8, 1976 who qualified for the exemption; and (2) resident veterans who moved to the state after that date, who did not. As such, the statute distinguished between bona fide state residents based upon their length of residency in New Mexico. 472 U.S. at 617.

The Supreme Court again struck the

fixed-point residency requirement as violative of the Equal Protection Clause, in that it was not rationally related to any legitimate state interest. Id. at 624. The Court distinguished a fixed-point residency requirement, such as this one, from legitimate "threshold waiting periods" (employed as a test of bona fide residency); singling out the former as unconstitutional. Id. at 616-617.

New Mexico proffered two of the same justifications advanced by Alaska in Zobel: 1) the encouragement of citizens to settle in New Mexico, and 2) the expression of appreciation to "its own citizens for honorable military service." Id. at 618-619. The Zobel Court had already ruled that a fixed residency requirement does not rationally further the goal of encouraging the migration of veterans to a state. In Hooper, the

Court reaffirmed that position, noting further that some residents might actually be discouraged from settling in New Mexico, since new arrivals were specifically ineligible for the veterans' tax exemption. "The separation of residents into classes hardly seems a likely way to persuade new [residents] that the State welcomes them and wants them to stay." Hooper, 472 U.S. at 619-620, citing Zobel, 457 U.S. at 62, n. 9.

With respect to the second state interest, the Court recognized as legitimate the goal of rewarding veterans for their wartime service. But, again, ruled that restricting eligibility to only those who were state residents as of a certain fixed date bore no rational relationship to the state's interest.

Finally, the Hooper Court rejected the argument that the distinction was

merited by the State's obligation to care for "its own." "Newcomers, by establishing bona fide residence in the state, become the state's 'own' and may not be discriminated against solely on the basis of their arrival in the state after [a fixed date]." Id. at 623.

The Supreme Court similarly invalidated a Vermont use tax exemption on Equal Protection grounds in Williams v. Vermont, 472 U.S. 14, 105 S.Ct. 2465 (1985). Vermont exempted from an automobile use tax requirement only those Vermont residents who had lived in Vermont at the time they purchased their cars out of state. The Court stated, "we perceive no legitimate purpose...that is furthered by this discriminatory exemption ... [R]esidence at the time of purchase is a wholly arbitrary basis on which to distinguish between present

Vermont registrants." 472 U.S. at 23, 105 S.Ct. at 2471-72.

Zobel, Hooper and Williams are clearly dispositive of the instant case. The State of California has conditioned, whether directly, by statute, or indirectly, by a provision in the Budget Act, eligibility for several veterans' benefits on the veteran's having been a state resident as of a particular time in history. The fixed-point residency requirements in Military & Veterans Code Sections 980 and 890(a)(4) and Item 1960 of each Annual Budget Act are virtually identical to those previously found to be unconstitutional.

The Petitioners have not offered a single justification not already specifically rejected by this Court. Their arguments are simply contrary to established precedent.

Lastly, in Attorney General of New York v. Soto Lopez, supra, while ruling on the relevant issues as they apply to the instant case, this Court was quite clear. A majority of this Court determined that the statute in question failed to satisfy the rational basis test under the equal protection clause. Soto Lopez, supra, 476 U.S. at 913. Thus, the Soto Lopez case is of no avail to Petitioners. This Court, by a plurality of five judges, determined that a virtually identical statute violated the equal protection clause. There were other issues litigated in the case, but in ruling on the prime issue, that of equal protection, there was clearly a plurality which determined that, under the less stringent rational basis test, the statute failed. As the California Supreme Court described in the case

below, the statute in question is virtually identical to those statutes in Zobel, Hooper, and Soto Lopez.

CONCLUSION

In order for this Court to take this case, it must be willing to disregard and, in effect, overturn four of its prior decisions. Then, and only then, can this Court take the case.

There is no unsettled area of law as it relates to statutes such as the one in question. The cases which this Court has determined have ruled directly on point that these constitute denials of equal protection. This Court should not accept

this offer to overturn years of precedent. Certiorari should not be granted.

Dated: October 16, 1992

Respectfully submitted,

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